Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

OVALEE BAREFOOT, ET AL.,
Petitioners,

v.

CITY OF WILMINGTON, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether North Carolina's annexation scheme, when viewed as a whole, violates Petitioners' equal protection of the law?

2. Whether the Fourth Circuit's decision incorrectly broadens the Rooker-Feldman Doctrine to an extent that renders access to the federal courts on federal constitutional challenges practically impossible?

PARTIES TO THE PROCEEDING

Petitioners

Petitioners include the following original Plaintiffs in this action: OVALEE BAREFOOT; GEORGE WRAGE; NICHOLAS FOKAKIS; and SHARON ALLEN. These individuals are citizens of the United States residing in the Eastern District of North Carolina. These Petitioners have no corporate affiliations. These Petitioners were the original Plaintiffs in the District Court, and the Plaintiff-Appellants in the Fourth Circuit Court of Appeals.

Petitioners also include the following Intervener Plaintiffs in this action: ALGERON L. BUTLER, JR.; SUSAN D. BUTLER; JOHN E. BRYANT; SHERRY W. BRYANT; WILLIAM A. HURST; LILLIAN W. HURST; MILES C. HIGGINS; MARGARET G. W. HIGGINS; MILES C. HIGGINS, III; COLLEEN M. HIGGINS; JOHN R. HICKS; CAROLYN T. HICKS; ALBERT E. WILLARD; ELIZABETH W. WILLARD; MARTIN S. WILLARD; GABRIELLE H. WILLARD; SALLY H. REARDON; WILLIAM M. WILLARD; THOMAS L. JOYCE; SUZANNE S. JOYCE; JOHN J. ORMOND; DAVID L. ORMOND; MARY C. ORMOND; CLAUDE H. McALLISTER, JR.; NANCY H. McALLISTER; KEVIN S. SCULLY; MADELINE M. SCULLY; HARRIETT RIEMAN; JACK A. ALFORD; JULIAN H. BRADBERRY, JR.; MARY A. BRADBERRY; VANDER M. CLEMMONS; MURRAY J. DEGNAN; GLORIA R. DEGNAN; GEORGE DITCHEOS; BARBARA DITCHEOS; RONALD L. DOWNING; BARBARA J. DOWNING; HENRY P. DOZIER; FRANCES M. DOZIER; GARY D. GALLOWAY; JENNIE GALLOWAY; GREGORY V. GIAMMALVO; GLORIA J. GIAMMALVO; WILLIAM B.

HAVERTY; EDNA B. HAVERTY; CHARLES E. HORTON; FLOYD P. KIRBY; LINDA N. KIRBY; CLIFF C. MABRY, JR.; MARTY MABRY; C. ROY MALLOTT; RICHARD H. MARSTON, JR.; JOAN P. MARSTON; HUGH A. McEACHERN, JR.; MARY L. McEACHERN; JOHN V. METTS; SUSAN METTS; BESSIE G. PENNINGTON; KARL O. PIERCE; JUDY PIERCE; JOEL T. PINER; H. VAN REID; DOROTHY B. REID; JAMES W. ROUSE, JR.; JANIS M. ROUSE; PHILLIP A. SCARRELL; MONA R. SMALLEY; KENNETH SMITH; PAULA SMITH; EDWIN E. SPENCER; MONICA R. SPENCER; HOWARD J. TALLEY; BETSY TALLEY; RICHARD L. WOODBURY; SUZANNE M. WOODBURY; BARBARA D'EMELIO; HERCHEL E. ROGERS; JULIA P. ROGERS; JOHN C. BYRNES, III; MARGARET J. BYRNES; ROBERT E. DOYLE; JAMES RAYBURN; SARAH RAYBURN; CATHERINE C. TAMISIEA; DANIEL J. FILOMENA; CATHERINE FILOMENA; KIRK A. HOWARD; BARBARA A. HOWARD; J. DON BULLARD; and FAYDENE S. CORBETT. These individuals are citizens of the United States residing in the Eastern District of North Carolina. These Petitioners have no corporate affiliations. These Petitioners were the Intervener-Plaintiffs in the District Court, and the Intervener-Appellants in the Fourth Circuit Court of Appeals.

Respondents

Respondent CITY OF WILMINGTON is a municipal corporation situated in the Eastern District of North Carolina and is the original Defendant in this action. Petitioners are unaware of any publicly held company holding a ten percent (10%) or greater interest in this Respondent. This Respondent was the original Defendant in the District Court, and the Defendant-Appellee in the Fourth Circuit Court of

Appeals.

Respondent STATE OF NORTH CAROLINA intervened in this action as an Intervener-Appellee in the Fourth Circuit Court of Appeals. Petitioners are unaware of any publicly held company holding a ten percent (10%) or greater interest in this Respondent.

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INTRODUCTION

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fourth Circuit opinion is reported as unpublished at 37 Fed. Appx. 626, 2002 U.S. App. LEXIS 11106 (4th Cir. 2002). (App. A) The District Court opinion is unreported and unpublished. (App. B)

STATEMENT OF JURISDICTION

The judgment of the Fourth Circuit was entered on June 10, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the following constitutional provisions:

A. U.S. CONST., amend. XIV, §1 (*Equal Protection Clause*), providing as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. N.C. CONST., Art. I, §19 (*Equal Protection Clause*), providing as follows:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

The case also involves the following statutory provisions:

A. Chapter 160A, Article 4A, Part 3 of the North Carolina General Statutes, providing the authority for involuntary annexation without a right to vote. (App. C)

B. 1991 N.C. Sess. Laws Ch. 638, an act providing that any annexations by the Town of Holden Beach be subject to a majority vote by referendum. (App. D)

C. 1997 N.C. Sess. Laws Ch. 363, an act providing that any annexations by the Town of River Bend be subject to a majority vote by referendum. (App. D)

STATEMENT OF THE CASE

The original Plaintiffs, comprising four of the Petitioners herein, commenced this action on September 29, 2000 to challenge the City of Wilmington's forcible annexation of their properties on September 30, 2000. These individuals asserted a denial of equal protection respecting fundamental voting and liberty rights under the Fourteenth Amendment of the United States Constitution and Article 1, Section 19 of the North Carolina Constitution. In addition to requesting declaratory relief, they moved for a Temporary Restraining Order against implementing the annexation, and a Preliminary Injunction pending the outcome of the case. The District Court denied the Temporary Restraining Order approximately one month after the request was made, and failed to rule on the Motion for Preliminary Injunction for several more months.

Meanwhile, the Intervener Plaintiffs, comprising the balance of the Petitioners herein, moved to intervene in the pending action. All parties requested certification to the North Carolina Attorney General pursuant to 28 U.S.C. §2403(b) and Rule 24(c) of the Federal Rules of Civil Procedure.

On January 4, 2001, the District Court denied Petitioners' Motion for Preliminary Injunction and granted the aforesaid Motion to Intervene. (App. B) Petitioners appealed the denial of the Preliminary Injunction to the Fourth Circuit.

On September 7, 2001, the District Court, relying heavily upon *Hunter v. City of Pittsburgh*, dismissed all of Petitioners' claims. *See* 207 U.S. 161 (1907). (App. A) The District Court held that, while the State of North Carolina does not uniformly restrict the vote, there is no fundamental

right to vote on annexation. (App. B p. 35a)

Petitioners appealed the dismissal to the Fourth Circuit on September 21, 2001. (App. B p. 51a) The Fourth Circuit consolidated this appeal with Petitioners' earlier appeal. After hearing oral arguments on February 28, 2002, the Fourth Circuit, on June 10, 2002, affirmed the District Court's judgment in all respects. (App. A p. 22a) The Fourth Circuit also held that, as for the Petitioners who had been involved in certain prior state court proceedings attacking the subject annexation, the federal lawsuit was barred under the Rooker-Feldman Doctrine. (App. A p. 11a)

The District Court had jurisdiction over this action under 28 U.S.C. §1331, 28 U.S.C. §1343(a)(3), 28 U.S.C. §2201, 42 U.S.C. §1983 and Rule 57 of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT

I. Petitioners' equal protection claims are constitutionally compelling and fundamentally important.

Petitioners' equal protection claims allege that North Carolina's annexation scheme unfairly and unnecessarily discriminates against their fundamental right to vote on the challenged annexation. Petitioners' claims rest directly upon a bedrock of fundamental constitutional jurisprudence as decided by this Court.

"[I]t...is...repeatedly...recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law". *Cohen v. Coahoma County, Miss.*, 805 F. Supp. 398 (N.D. Miss.

1992) (citing *Elrod v. Burns*, 427 U.S. 347 (1976)). A threat to equal protection under the law involves rights that are "so fundamental to our legal system and to our society that any violation thereof will cause irreparable harm regardless of the financial impact". *M.C. West, Inc. v. Lewis*, 522 F. Supp. 338 (D.C. Tenn. 1981); *see also* Central Alabama Paving, Inc. v. James, 499 F. Supp. 629 (M.D. Ala. 1980).

As these authorities demonstrate, Petitioners' equal protection claims are constitutionally compelling and fundamentally important. By affirming the District Court's denial of injunctive relief and the Rule 12(b)(6) dismissal of Petitioners' equal protection claims, the Fourth Circuit has decided an important issue of constitutional law in a way that conflicts with this Court's controlling precedents.

II. The Fourth Circuit's decision on the right to vote claim conflicts with the relevant decisions of this Court.

Petitioners reside in an area that was involuntarily annexed by the City under the authority of Chapter 160A, Article 4A, Part 3 of the North Carolina General Statutes. (App. C) This legislative enactment does not extend the right to vote on a proposed annexation to any resident. Notwithstanding this enactment, however, the state legislature has not uniformly restricted that franchise within the borders of the state.

As demonstrated by the Fourth Circuit, there are several legislative enactments that currently authorize, on a local basis within the state, an annexation only when a majority of the affected residents approves the same in a referendum vote. *See, e.g.*, 1991 N.C. Sess. Laws Ch. 638, "An Act to Require that Any Extensions of the Corporate

Limits of the Town of Holden Beach be Subject to a Referendum", stating that "any annexation by the Town of Holden Beach...[is] effective only if approved by the qualified voters of the Town in a referendum...". *Id.* at Sec. 2. (App. D p. 128a); *and* 1997 N.C. Sess. Laws Ch. 363, "An Act to Restore Extraterritorial Planning Powers of the Town of River Bend but Prohibiting it from Making Involuntary Annexations", stating that "[i]f...a majority of the votes cast from the area proposed for annexation ...[are]... 'For Annexation', the annexation...[will] become effective as provided by this Part". *Id.* at (b). (App. D p. 122a)

The state legislature has thus extended the right to vote on annexation to some residents within the state's borders while restricting that franchise from other residents within the state who are similarly situated. Since the right to vote on annexation is a fundamental right, then the state's restriction of that right must be uniform and must not offend equal protection. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978).

Once a "franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment". *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). This is because "statutes distributing the franchise constitute the foundation of our representative society". *Kramer v. Union Free School District*, 395 U.S. 621 (1969). If a challenged legislative scheme grants the right to vote to some citizens and denies the franchise to others, then this "Court must determine whether the exclusions are necessary to promote a compelling state interest". *Id.*

Several important cases following *Kramer* were collected and reviewed in *Hill v. Stone*, which held that whenever the election in question is of general interest, then any restriction of the franchise on grounds other than residence, age or citizenship cannot stand unless the state can demonstrate that the restriction serves a compelling state interest. 421 U.S. 289 (1975).

Regarding annexation, the Fourth Circuit has held as follows:

> A change in the entire structure of local government is a matter of general interest. Annexation will affect the municipal services that every citizen receives...[and] brings about a complete change in the form of municipal government itself. *See Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978) (applying *Hill v. Stone's* strict scrutiny standard of review).

Based upon these authorities, annexation is a matter of general interest such that the right to vote on the same is a fundamental right and any restriction of that right must be strictly scrutinized. *Accord*, Texfi Indus., Inc. v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980) (according with the application of strict scrutiny when the discrimination against a fundamental voting right is at issue, but holding in favor of the challenged annexation since the plaintiff was a corporation that could not be endowed with fundamental rights). "I would hold that the denial of their right to vote in annexation referenda is a violation of equal protection of the laws". *Id.* (Carlton, J., dissenting). *See also* Northampton County Drainage Dist. Number One v. Bailey, 326 N.C. 742, 392 S.E.2d 352 (1990) (holding that the "right to vote on equal terms is...fundamental.... We must use strict scrutiny in determining whether...equal protection...was denied...").

There has never been articulated, at any stage of the proceedings below, a compelling state interest that makes it necessary to exclude Petitioners from being able to vote on the challenged annexation. With this omission, the Fourth Circuit's decision contradicts the legal precedents that control the disposition of this case.

III. The Fourth Circuit's decision on the right to vote claim is incorrect on its face.

The Fourth Circuit did not refute Petitioners' argument that the right to vote on annexation is a fundamental right. Indeed, the Fourth Circuit's decision recognizes as follows:

> It is only when the right to vote on a proposed annexation has been granted that "the equal protection clause requires that...restrictions of the franchise on grounds other than age, citizenship, and residence can be tolerated only upon proof that [they further' a compelling state interest". (App. A p. 13a) (quoting *Hayward*, 573 F.2d, *supra* and citing *Harper*, 383 U.S., *supra*).

Nevertheless, the Fourth Circuit concluded that the restriction of the franchise in Petitioners' case did not violate their equal protection of the law since "no one has ever been given the right to vote on the annexation proposed by the City of Wilmington". (App. A p. 13a)

Having correctly stated the law, the Fourth Circuit disregarded it when it affirmed the dismissal of Petitioners' right to vote claim. Relying upon the overly broad and excessive dicta of *Hunter v. City of Pittsburgh*, the Fourth

Circuit incorrectly held that the state did not need any basis at all to support its annexation scheme. *See Hunter*, 207 U.S., *supra*. (App. A) As an alternative basis, and again in error, the Fourth Circuit held that "there is surely a rational basis for North Carolina's approach to annexation". (App. A p. 15a)

It is difficult to understand how the Fourth Circuit, after acknowledging the applicability of strict scrutiny, could base its decision upon a rational basis test or upon no test at all. The Court was apparently persuaded by the fact that the franchise was uniformly restricted within the area proposed for annexation. The Fourth Circuit's focus on that local unit, however, is misplaced since the proper unit of government in this case is the state itself.

Under North Carolina's annexation scheme, only the state legislature can extend or restrict the franchise and it has not delegated that authority to any local units of government. Therefore, when a municipality is proceeding with an involuntary annexation under the General Statutes, no resident of the state can vote on the proposed annexation. Yet, and again by legislative enactment, other residents of the state do have the right to vote on annexation. Since annexation is a matter of general interest and the right to vote on the same is fundamental, and since the legislature has not uniformly restricted that fundamental right within the borders of the state, then restricting Petitioners' right to vote in this instance is a manifest violation of their equal protection of the law.

A compelling state interest making it necessary to exclude Petitioners from voting on the annexation has never been shown. Without such a showing, the Fourth Circuit's decision, like its analysis, is incorrect.

IV. The Fourth Circuit's decision incorrectly broadens the Rooker-Feldman Doctrine to an extent that renders access to the federal courts on federal constitutional challenges practically impossible.

In *Rooker, et al. v. Fidelity Trust Company, et al.*, the appellants sought nullification, by a federal District Court, of "a judgment of the Circuit Court of Indiana, which was affirmed by the Supreme Court of the State". 263 U.S. 413 (1923). *Rooker* found that the case had been fully adjudicated on its merits at the state level and that the case had proceeded through the state appellate court system. *Id.* In holding that the federal District Court lacked jurisdiction, the court stated that the appellants' complaint amounted to "merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of that jurisdiction". *Id.* The *Rooker* case thus verbalized the policy of the federal courts not to disturb the propriety – borne out of judicial economy and comity – of state appellate court judgments. That policy is codified in the United States Code, which provides that in cases involving constitutional questions, "final judgments ...rendered by the highest court of a [s]tate...may be reviewed by [only the United States] Supreme Court...". 28 U.S.C. §1257(a) (2001). For the reasons stated below, Petitioners did not seek federal review of a state court decision.

District of Columbia Court of Appeals, et al. v. Feldman, et al. expounded upon *Rooker* and created what is now known as the Rooker-Feldman Doctrine. 460 U.S. 462 (1983). In that case, appellant Feldman specifically challenged the state court's judgment, and even named as defendants the state appellate court and the chief judge thereof. *Id.* Appellant Feldman further specifically alleged

that the state appellate court's actions violated his Fifth Amendment rights. *Id.* In his federal complaint attacking the actions of a state appellate court, appellant Hickey, similarly, named as defendants the state appellate court and the judges thereof. *Id.* The case involved challenges to denials of state bar admissions, the regulation of which – as the court acknowledges – the state asserts a paramount interest. *Id.*

The instant case in no way resembles either *Rooker* or *Feldman*. No court and no judge was named as a defendant. The North Carolina Court of Appeals judgment in *Rogers, et al. v. City of Wilmington*, discretionary review of which was denied by the North Carolina Supreme Court, addressed as the "subject" of the matter, "the Atlantic Intracoastal Waterway" and whether said "Atlantic Intracoastal Waterway" sufficed as an adequate boundary under the North Carolina General Statutes. (App. E pgs. 131a, 134a) The state appellate courts thus addressed only whether the City of Wilmington had properly complied with North Carolina's annexation statutes, and the final state court judgment concluded that the City had in fact complied with the applicable statutes. *Id.*

The present federal case contains no claims that the City failed to comply with the North Carolina General Statutes. Instead, Petitioners requested that the applicable statutes be declared invalid because of constitutional violations. The federal claims asserted in this case lie independently of any claim that Petitioners may have made in state court. Petitioners did not ask the federal court to reverse the decision of any state court.

If Petitioners had been granted the relief sought in this action, then the judgment of the state court would no longer apply, not because it had been rendered ineffectual or had

been voided, but because the legislation through which it had materialized was nullified. Because Petitioners attacked North Carolina's annexation legislation and not the state court judgment in its own right, the Rooker-Feldman Doctrine cannot apply. To say otherwise would broaden the Rooker-Feldman Doctrine to such an extent that it would preclude most challenges to the constitutional validity of state statutes. Such a broadening would allow a party defending a challenged statute to assert the Rooker-Feldman Doctrine as a jurisdictional bar if the defending party found even one judgment that would be rendered ineffectual or voided by virtue of striking the statute. Such a broadening would impermissibly dilute the effects of the Constitution, and is not within the intent of the Rooker-Feldman Doctrine.

The *Feldman* court distinguishes cases in which the plaintiff seeks review of the actions of a state high court from cases in which the plaintiff mounts a general challenge to the constitutionality of a rule of statute. *Feldman*, 460 U.S., *supra*.

The *Feldman* court acknowledges a "subtle but fundamental distinction between the two types of claims that might be brought in federal court". *Id.* (quoting *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976), *cert. denied* 431 U.S. 916 (1977)). The distinction lies between a "constitutional challenge to a state's general" statutes and a challenge, "based on constitutional or other grounds, that the state" court has acted unlawfully in some particular matter. *Id.* Justice Stevens, in his dissenting opinion in *Feldman*, argues that the court should not have even made this distinction, because it attempts to segregate facial constitutional challenges from applied constitutional challenges, both of which are appropriate subject matter for the federal courts, regardless of any effect on state court judgments. *Id.*, Stevens, J.,

dissenting.

While a court must consider the nature of the relief requested, it must also undertake a realistic consideration of the underlying claim. *See* Guess v. Board of Medical Examiners, 967 F.2d 998 (4th Cir. 1992) (stating that "artificial attempts to redefine the relief sought are not sufficient to overcome the requirements of *Feldman*"). *See also* Carbonell v. Louisiana Department of Health and Human Resources, 772 F.2d 185 (5th Cir. 1985).

> To determine whether [the Rooker-Feldman Doctrine applies] requires determining exactly what the state court held and whether the relief requested...in [the] federal action requires determining the state court's decision is wrong.... *Charchenko v. City of Stillwater*, 47 F.3d 981 (8th Cir. 1995).

The state appellate courts herein ultimately held that the City had properly complied with the applicable statutes. Petitioners' federal claims, however, in no way resemble the claims that were considered by the state courts. In the federal case, Petitioners seek a declaration regarding North Carolina's entire scheme of annexation legislation, not merely annexation as it relates to the City and surrounding areas. In the state case, the relief sought was a narrow declaration regarding whether an ordinance passed by the City complied with the very state statutes Petitioners seek to nullify. The federal action cannot thus be construed as an "artificial attempt to redefine the relief sought" at the state level.

The Rooker-Feldman Doctrine applies to adjudications only, not to legislative acts. *Feldman*, 460 U.S., *supra*. Adjudications involve the application of existing laws to the

facts of a particular case, while legislative acts "look to the future [and] change existing conditions by making a new rule to be applied thereafter to all or some part of those subject to [their] powers". *Id.* In the instant case, the state court proceedings involved the application of the state's existing annexation laws to the City's annexation ordinance. The federal court proceedings, by contrast, address the constitutionality of the state's annexation laws themselves. That the City's annexation ordinance might fall as a result of the federal proceedings is merely incidental to the primary relief sought.

In *Jordahl v. Democratic Party of Virginia*, the court illustrates as follows:

> A distinction must be made between actions seeking review of the state court decisions themselves and those cases challenging the constitutionality of the process by which the state court decisions resulted. For example, in *Feldman*, the [c]ourt recognized that the plaintiff was allowed to challenge the constitutionality of the rule under which he had been denied admission to the bar, but the [c]ourt prohibited the plaintiff from challenging, in federal court, the denial itself. 122 F.3d 192 (4th Cir. 1997), *cert. denied* 522 U.S. 1077 (1998) (citing *Feldman*, 460 U.S., *supra*). *See also Van Harken v. City of Chicago*, 103 F.3d 1346 (7th Cir. 1997), *cert. denied* 520 U.S. 1241 (1997) (holding that the Rooker-Feldman Doctrine did not apply in a case wherein the federal plaintiffs' action merely seeking a declaration that the process under which parking charges were imposed were constitutionally

inadequate, and not challenging the judgment in any one parking case).

Petitioners seek a declaration that North Carolina's annexation statutes – the "process" through which the state court judgment materialized – are constitutionally inadequate. They are not attacking any state court judgment, either on its face or as part of some "underlying claim".

Petitioners did not assert their federal constitutional challenges at the state court level. Although the Rooker-Feldman Doctrine has been used as a bar in some cases where federal constitutional challenges could have been raised – but were not raised – in the state courts, it applies if and only if the federal constitutional claims are "inextricably intertwined" with the state appellate court's judgment. *Feldman*, 460 U.S., *supra*.

Whether federal constitutional claims are "inextricably intertwined" with a state court's judgment depends upon whether the party asserting the federal claims had a "reasonable opportunity" to raise its federal claims in the state proceedings. *Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194 (4th Cir. 2000). This is so because "where such an opportunity is lacking, an issue cannot [by definition] be inextricably intertwined with a state court action...". *Id.* Petitioners were denied such an opportunity. The statutes themselves expressly state that judicial review is limited to whether a given municipality complied with the statutes, thus precluding constitutional attack on the statutes themselves. N.C. GEN. STAT. §160A-50 (1999). Moreover, considering North Carolina's bias and judicial history respecting the issue of forcible annexation, Petitioners recognized that attacking the statutes in state court would prove fruitless, would amount to a waste of resources and would not amount to a

"reasonable opportunity" to have their claims heard. They thus chose to bring their constitutional claims in federal court pursuant to federal question jurisdiction. *See* 28 U.S.C. §1331 (2001) (providing that federal courts "have *original jurisdiction* of all civil actions arising under the Constitution, treaties or laws of the United States [emphasis added]"). *See also* 42 U.S.C. §1983 (2001).

In *Jordahl*, the appellants sought federal review of certain injunctions issued by the state's highest court, alleging that the state court's actions issuing said injunctions gave rise to the appellants' claimed injuries. *Jordahl*, 122 F.3d, *supra*. The lower court in *Jordahl* had concluded that it lacked jurisdiction because the claimants were "essentially claiming injury at the hands of the state court". *Jordahl v. Democratic Party of Virginia*, 947 F. Supp. 236 (W.D. Va. 1996), *aff'd* 122 F.3d 192 (4th Cir. 1997). The lower court in *Jordahl* further determined that a given federal claim is "inextricably intertwined" when a litigant challenges not the "underlying procedure as unconstitutional", but "instead seeks review of the state court judgment" in its particular case. *Id.* In order to be considered "inextricably intertwined", the federal claim must assert an injury that actually "stems from the state court judgment". *Id.* Petitioners here did not assert any injury stemming from a judgment of any state court, but against the entire statutory scheme -- the "underlying procedure". In quoting *Young v. Murphy*, 90 F.3d 1225 (7th Cir. 1996), *rehrg. denied* 1996 U.S. App. LEXIS 26094 (7th Cir. 1996), the *Jordahl* court states as follows:

> [The alleged] injury resulted from the state court judgment...and not from the alleged denial of due process. Had [the plaintiff] prevailed in the [earlier] hearing...he would have had no injury and no constitutional claim

> to bring before the [federal] court. *Jordahl*, 122 F.3d, *supra*.

In the instant case, certain individuals aggrieved by the City's forced annexation filed proceedings in state court and were successful in proving that the City had not complied with the statute; thus, the individuals successfully delayed the annexation. This relief, however, amounted to a mere bandage, since the City simply thereafter took certain actions to comply with the applicable statutes and with the state court's judgment, with the annexation eventually becoming effective. When the annexation became effective for the second time, some of the aforesaid individuals again challenged the annexation in state court, asserting as claims for relief grounds similar to the ones asserted in the first state court action. Assuming, *arguendo,* that the individuals who brought the second state court case had ultimately prevailed in those proceedings, then the victory would have amounted, once again, to a mere delay of the annexation with no permanent relief. Thus, those individuals' "injuries" would have been momentarily bandaged, but not cured. Furthermore, the "injuries" would have immediately resurrected themselves upon the City's subsequent compliance with the judgment. Petitioners' federal claims, on the other hand, seek – through constitutional nullification of the offensive statutes – a permanent remedy, a cure. The remedy, if granted, would have statewide ramifications.

If, "in order to grant the federal plaintiff the relief sought, the federal court must determine that the [state] court judgment was erroneously entered or [the federal court] must take action that would render the [state court] judgment ineffectual", then the Rooker-Feldman Doctrine applies. *Jordahl*, 122 F.3d, *supra* (quoting *Ernst v. City of Youth Servs.*, 108 F.3d 486 (3rd Cir. 1997), *cert. denied* 522 U.S.

850 (1997)). *See also* Charchenko, 47 F.3d, *supra* (stating that the Rooker-Feldman Doctrine applies when "the relief requested...requires determining that the state court decision is wrong or [said relief] would void the state court's ruling").

"A [party] who has lost in state court and sues in federal court [who] does not assert injury at the hands of his adversary [but]...at the hands of the court" cannot thereby obtain "collateral review". *Homola v. McNamara*, 59 F.3d 647 (7th Cir. 1995). Nowhere in their pleadings did Petitioners assert any injury at the hands of the state court. They asserted not only different claims, but they sought relief which differed entirely from the relief sought in state court.

> Under either the "actually decided" or "inextricably intertwined" prong, the principle [of the Rooker-Feldman Doctrine] is the same: "A party losing in state court is barred from seeking what in substance would be appellate review of a state judgment in United States district court, based on the losing party's claim that the *state judgment itself* violates the loser's federal rights" [emphasis added]. *Brown & Root, Inc.*, 211 F.3d, *supra* (quoting *Johnson v. DeGrandy*, 512 U.S. 997 (1994)).

Petitioners do not seek federal review of any state court judgment; rather, their claims lie completely independently of the prior state court claims. Accordingly, the principles of the Rooker-Feldman Doctrine were not served by the Fourth Circuit's dismissal of this case for lack of subject-matter jurisdiction.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted this 9th day of September, 2002,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed June 10, 2002]

No. 01-1185, No. 01-2191

OVALEE BAREFOOT; GEORGE WRAGE; SHARON ALLEN; NICHOLAS FOKAKIS; ALGERON LEE BUTLER, JR.; SUSAN DEIBERT BUTLER; JOHN ELLIS BRYANT; SHERRY WILLIAMS BRYANT; THEODORE HERRING HEWLETT, SR.; ANN JOYCE HEWLETT; WILLIAM ADDISON HURST; LILLIAN WILLIAMSON HURST; MILES CREAMER HIGGINS; MARGARET GLENDY WILLIARD HIGGINS; MILES CREAMER HIGGINS, III; COLLEEN MITHCEL HIGGINS; JANET MOORE HICKS; JOHN RUSSELL HICKS; CAROLYN TIMMS HICKS; ALBER EMERSON WILLARD; ELIZABETH WHITE WILLARD; MARTIN STEVENSON WILLARD; GABRIELLE HOLMES WILLARD; RICHARD BENTLEY WALDKIRCH; CAROL WELCH WALDKIRCH; SALLY HICKS REARDON; WILLIAM MARTIN WILLARD; THOMAS LEO JOYCE; SUZANNE SPENCE JOYCE; JOHN JAMES ORMOND; DAVID LEWIS ORMOND; MARY CAIN ORMOND; CLAUDE HUNTLEY MCALLISTER, JR.;

NANCY HARDACRE MCALLISTER; KEVIN)
SLEAN SCULLY; MADELINE MARGURITE)
SCULLY; HARRIETT RIEMAN; JACK A.)
ALFORD; ALLAN L. ANTES; JANE L.)
ANTES; JOSEPH F. AUGUSTINE;)
CAROLYN R. AUGUSTINE; ROBERT C.)
BOWEN, SR.; MARY L. BOWEN; JULIAN)
H. BRADBERRY, JR.; MARY A.)
BRADBERRY; VANDER M. CLEMMONS;)
GLORIA R. DEGNAN; MURRAY J. DEGNAN;)
GEORGE DITCHEOS; BARBARA DITCHEOS;)
ROBERT L. DOWNING; HENRY P. DOZIER;)
FRANCES M. DOZIER; GARY D.)
GALLOWAY; JENNIE GALLOWAY;)
GREGORY V. GIAMMALVO; GLORIA J.)
GIAMMALVO; WILLIAM B. HAVERTY;)
EDNA B. HAVERTY; KEVIN J. HOBAN;)
MICHELLE HOBAN; CHARLES E. HORTON;)
WILLIAM S. HOWELL; MOLLY HOWELL;)
FLOYD P. KIRBY; LINDA N. KIRBY; CLIFF)
C. MABRY, JR.; MARTY MABRY; C. ROY)
MALLOTT; RICHARD H. MARSTON, JR.;)
JOAN P. MARSTON; HUGH)
ALEXANDER MCEACHERN, JR.; MARY)
MCEACHERN; JOHN V. METTS; SUSAN)
METTS; RICHARD L. PENNINGTON;)
BESSIE G. PENNINGTON; KARL O. PIERCE;)
JUDY PIERCE; JOEL T. PINER; H. VAN)
REID; DOROTHY B. REID; JAMES W.)
ROUSE, JR.; JANIS M. ROUSE; PHILLIP A.)
SCARRELL; MONA R. SMALLEY; KENNETH)
SMITH; PAULA SMITH; EDWIN E. SPENCER;)
MONICA R. SPENCER; HOWARD J. TALLEY;)
BETSEY TALLEY; GUSTAVE J. VAN)
NYNATTEN; JOANNA P. VAN NYNATTEN;)

RICHARD L. WOODBURY; SUZANNE M. WOODBURY; BARBARA E'EMELIO; HERCHEL E. ROGERS; JULIA P. ROGERS; JOHN C. BYRNES, III; MARGARET J. BYRNES; ROBERT E. DOYLE; JAMES RAYBURN; SARAH RAYBURN; CATHERINE C. TAMISIEA; DANIEL J. FILOMENA; CATHERINE FILOMENA; KIRK A. HOWARD; BARBARA A. HOWARD, J. DON BULLARD; FAYDENE S. CORBETT,
Plaintiffs-Appellants,

v.

CITY OF WILMINGTON, NORTH CAROLINA,
Defendant-Appellee,

STATE OF NORTH CAROLINA,
Intervenor-Appellee.

OVALEE BAREFOOT; GEORGE WRAGE; SHARON ALLEN; NICHOLAS FOKAKIS; ALGERON LEE BUTLER, JR.; SUSAN DEIBERT BUTLER; JOHN ELLIS BRYANT; SHERRY WILLIAMS BRYANT; THEODORE HERRING HEWLETT, SR.; ANN JOYCE HEWLETT; WILLIAM ADDISON HURST; LILLIAN WILLIAMSON HURST; MILES CREAMER HIGGINS; MARGARET GLENDY WILLIARD HIGGINS; MILES CREAMER HIGGINS, III; COLLEEN MITHCEL HIGGINS; JANET MOORE HICKS; JOHN RUSSELL HICKS; CAROLYN TIMMS HICKS; ALBERT EMERSON WILLARD; ELIZABETH WHITE

WILLARD; MARTIN STEVENSON)
WILLARD; GABRIELLE HOLMES WILLARD;)
RICHARD BENTLEY WALDKIRCH; CAROL)
WELCH WALDKIRCH; SALLY HICKS)
REARDON; WILLIAM MARTIN WILLARD;)
THOMAS LEO JOYCE; SUZANNE SPENCE)
JOYCE; JOHN JAMES ORMOND; DAVID)
LEWIS ORMOND; MARY CAIN ORMOND;)
CLAUDE HUNTLEY MCALLISTER, JR.;)
NANCY HARDACRE MCALLISTER; KEVIN)
SLEAN SCULLY; MADELINE MARGURITE)
SCULLY; HARRIETT RIEMAN; JACK A.)
ALFORD; ALLAN L. ANTES; JANE L.)
ANTES; JOSEPH F. AUGUSTINE; CAROLYN)
R. AUGUSTINE; ROBERT C. BOWEN, SR.;)
MARY L. BOWEN; JULIAN H. BRADBERRY,)
JR.; MARY A. BRADBERRY; VANDER M.)
CLEMMONS; GLORIA R. DEGNAN;)
MURRAY J. DEGNAN; GEORGE DITCHEOS;)
BARBARA DITCHEOS; ROBERT L.)
DOWNING; HENRY P. DOZIER; FRANCES M.)
DOZIER; GARY D. GALLOWAY; JENNIE)
GALLOWAY; GREGORY V. GIAMMALVO;)
GLORIA J. GIAMMALVO; WILLIAM B.)
HAVERTY; EDNA B. HAVERTY; KEVIN J.)
HOBAN; MICHELLE HOBAN; CHARLES E.)
HORTON; WILLIAM S. HOWELL; MOLLY)
HOWELL; FLOYD P. KIRBY; LINDA N.)
KIRBY; CLIFF C. MABRY, JR.; MARTY)
MABRY; C. ROY MALLOTT; RICHARD H.)
MARSTON, JR.; JOAN P. MARSTON;)
HUGH ALEXANDER MCEACHERN, JR.;)
MARY MCEACHERN; JOHN V. METTS;)
SUSAN METTS; RICHARD L. PENNINGTON;)
BESSIE G. PENNINGTON; KARL O. PIERCE;)

JUDY PIERCE; JOEL T. PINER; H. VAN REID; DOROTHY B. REID; JAMES W. ROUSE, JR.; JANIS M. ROUSE; PHILLIP A. SCARRELL; MONA R. SMALLEY; KENNETH SMITH; PAULA SMITH; EDWIN E. SPENCER; MONICA R. SPENCER; HOWARD J. TALLEY; BETSEY TALLEY; GUSTAVE J. VAN NYNATTEN; JOANNA P. VAN NYNATTEN; RICHARD L. WOODBURY; SUZANNE M. WOODBURY; BARBARA E'EMELIO; HERCHEL E. ROGERS; JULIA P. ROGERS; JOHN C. BYRNES, III; MARGARET J. BYRNES; ROBERT E. DOYLE; JAMES RAYBURN; SARAH RAYBURN; CATHERINE C. TAMISIEA; DANIEL J. FILOMENA; CATHERINE FILOMENA; KIRK A. HOWARD; BARBARA A. HOWARD, J. DON BULLARD; FAYDENE S. CORBETT,

Plaintiffs-Appellants,

v.

CITY OF WILMINGTON, NORTH CAROLINA,

Defendant-Appellee,

STATE OF NORTH CAROLINA,

Intervenor-Appellee.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Wilmington
Terrence W. Boyle, Chief District Judge
(CA-00-182-7-3-BO)

JUDGES:
Before WILKINS, LUTTIG, and GREGORY, Circuit Judges. Judge Gregory wrote the opinion, in which Judge Wilkins and Judge Luttig joined.

OPINION

GREGORY, Circuit Judge:

The Appellants challenge the City of Wilmington's decision to annex territory on which they reside. They assert that the annexation violates the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment, the Takings Clause of the Fifth Amendment, and the Privileges and Immunities Clause of Article IV. We hold that Wilmington's actions did not violate any of these provisions of the United States Constitution. We also hold that the district court did not err in denying the Appellants' joinder motion. Accordingly, we affirm.

I.

The City of Wilmington is located in eastern North Carolina in New Hanover County. Wilmington's current land area encompasses approximately 54.3 square miles, with a population of approximately 90,400. On June 2, 1998, the Wilmington City Council adopted an ordinance to annex an area known as the "1998 Annexation Area." The 1998 Annexation Area consisted of approximately 9.27 square miles of land, lying between the pre-annexation eastern city limit and the Intracoastal Waterway (opposite the Masonboro Inlet), with a population of approximately 13,000 residents. The ordinance was adopted pursuant to N.C. Gen. Stat. § 160A-49 (1999), which authorizes North Carolina cities with

populations in excess of 5,000 to annex contiguous territory. Section 160A-49 does not provide for a vote by either the residents of the area to be annexed or the residents of the annexing city.[1]

In addition to the General Assembly's delegation of authority to municipalities, the General Assembly has the authority to adopt local acts specifying the boundaries of municipalities, and the manner of any alteration. N.C. Gen. Stat. § 160A-21 (1999). The General Assembly has, from time to time, enacted such local acts, and subjected the local act to referenda. There are at least five municipalities where the General Assembly has adopted local acts to provide for a referendum on annexations: cities in Craven County with populations of less than 500 (Ch. 92, 1985 N.C. Sess. Laws); Holden Beach (Ch. 638, 1991 N.C. Sess. Laws); River Bend (Ch. 363, 1997 N.C. Sess. Laws); Wentworth (Ch. 322, 1997 N.C. Sess. Laws); and Bermuda Run (Ch. 94, 1999 N.C. Sess. Laws). In Holden Beach, the residents of the municipality must approve the annexation while in the other towns, an annexation is subject to a referendum by the residents of the proposed annexation area.

Appellants Barefoot, Wrage and Fokakis (the "Plaintiff-Appellants"), and approximately 100 Interveners (the "Intervener-Appellants") (collectively the "Appellants"), reside in the 1998 Annexation Area. J.A. 21-29. The Appellants are opposed to the annexation. The first attempt to

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[1] The General Assembly has provided for similar procedures for municipalities with populations under 5,000. N.C. Gen. Stat. §§ 160A-33 through 160A-43 (1999). These procedures also do not provide for a vote on annexation.

block the annexation was made in state court. All but approximately eighteen of the Appellants filed a joint petition for review in the New Hanover County Superior Court pursuant to N.C. Gen. Stat. § 160A-50 (1999). J.A. 47-54. The claims included only state law claims. The Superior Court upheld the ordinance. The North Carolina Court of Appeals affirmed, *Rogers, et al. v. City of Wilmington*, N.C. App. No. COA99-674 (New Hanover Cty. April 18, 2000), and the North Carolina Supreme Court denied discretionary review, *Rogers, et al. v. City of Wilmington*, 352 N.C. 591, 544 S.E.2d 704 (2000).

The Plaintiff-Appellants commenced this action on September 29, 2000 in the Eastern District of North Carolina alleging that the annexation violated the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, and seeking declaratory and injunctive relief. The Plaintiff-Appellants moved for and were denied a temporary restraining order and a preliminary injunction. The Plaintiff-Appellants filed an appeal of the district court's order denying their motion for a preliminary injunction. *Barefoot v. City of Wilmington, No. 01-1185.* On January 16, 2001, the Intervener Appellants filed a complaint, alleging that the annexation violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, and the Privileges and Immunities Clause of Article IV, U.S. Const. art. IV, § 2. While the appeal in No. 01-1185 was pending, the City filed a motion to dismiss both complaints for failure to state a claim in the district court. Shortly thereafter, the Appellants filed a motion to join Walter Futch as a plaintiff and the Town of Leland as a defendant. Futch is a resident of an area annexed by the Town of Leland. The Town of Leland is approximately six miles from

Wilmington, and the annexation Futch sought to challenge was unrelated to Wilmington's annexation. On September 7, 2001, the district court granted the City's motion to dismiss and denied the Appellant's motion to join Walter Futch as a plaintiff and the Town of Leland as a defendant. The Appellants filed a timely appeal. *Barefoot v. City of Wilmington*, No. 01-2191. The City moved for dismissal of appeal No. 01-1185 as moot. The Appellants moved to consolidate the appeals. On October 11, 2001, we voted to defer ruling on the City's motion to dismiss, voted to grant the Appellant's motion to consolidate, ordered supplemental briefing, and rescheduled oral arguments.[2]

II.

The court reviews a district court's dismissal under Rule 12(b)(6) *de novo*. *See Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). We consider the evidence in the light most favorable to the nonmoving party, and we accept as true all well pleaded allegations. *Id.* The district court's denial of a joinder motion is reviewed for abuse of discretion. *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1108 (4th Cir. 1980).

III.

Before reaching the merits of the appeal, there is a preliminary issue that requires attention. For the first time on appeal, the City argues that the federal courts lack subject matter jurisdiction under the *Rooker-Feldman* doctrine. The

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[2] Our decision in No. 01-2191 renders No. 01-1185 moot. Accordingly, we dismiss No. 01-1185.

Rooker-Feldman doctrine generally bars district courts from "sitting in direct review of state court decisions." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n. 16, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983); *Rooker v. Fidelity Trust* Co., 263 U.S. 413, 415-16, 68 L. Ed. 362, 44 S. Ct. 149 (1923). The prohibition extends "not only to issues actually decided by a state court but also to those that are inextricably intertwined with questions ruled upon by a state court." *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 857-58 (4th Cir. 2001) (quotation marks omitted). "A federal claim is 'inextricably intertwined' with a state court decision if success on the federal claim depends upon a determination that the state court wrongly decided the issues before it." *Id.* In addition, the *Rooker-Feldman* doctrine bars issues that *could* have been raised in the state court proceeding. *Feldman*, 460 U.S. at 482 n. 16; *Allstate Insurance Co. v. West Virginia State Bar*, 233 F.3d 813, 819 (4th Cir. 2000); *Guess v. Board of Medical Examiners of the State of South Carolina*, 967 F.2d 998, 1003 (4th Cir. 1992). Claims by individuals not party to the state court proceedings, however, are not barred. *Gross v. Weingarten*, 217 F.3d 208, 218 n. 6 (4th Cir. 2000). Because the *Rooker-Feldman* doctrine goes to subject matter jurisdiction, it may be raised at any time. *Plyler v. Moore*, 129 F.3d 728, 731 n.6 (4th Cir. 1997).

Part of the City's argument is easily dismissed. Three of the Plaintiffs-Appellants, and approximately fifteen of the Intervener Appellants, were not parties to the state court proceedings. Appellee's Br. at 10-11. The *Rooker-Feldman* doctrine does not divest the court of subject matter jurisdiction as to their claims. *Gross*, 217 F.3d at 218 n. 6.

As for the Appellants that were parties in the state court proceeding, we hold that the *Rooker-Feldman* doctrine bars this suit. The Appellants admit that the prior state proceedings addressed "whether [the City] had properly complied with North Carolina's annexation statutes . . . ." Appellants' Reply Br. at 2-3. They further admit that the present action seeks a ruling that those same statutes are unconstitutional. The City contends that the Appellants had a "reasonable opportunity," *Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194, 201 (4th Cir. 2000), to litigate the constitutional issues in state court. *Feldman*, 460 U.S. at 482 n. 16; *Allstate Insurance*, 233 F.3d at 819; *Guess*, 967 F.2d at 1003. According to the City, North Carolina state courts may consider both state and federal constitutional challenges in reviewing annexation ordinances. *See, e.g., In re Annexation Ordinance (Winston-Salem),* 303 N.C. 220, 227, 278 S.E.2d 224 (1981) (considering and rejecting Fourteenth Amendment challenge to N.C. Gen. Stat. § 160A-45 *et seq.); In re Annexation Ordinance (Raleigh)*, 253 N.C. 637, 651-52, 117 S.E.2d 795 (1961) (same). The City appears to be correct, and the record does not suggest that the state court petitioners attempted to raise constitutional challenges in the state court proceedings but were prohibited from doing so. Consequently, with respect to the Appellants that were parties to the state court proceeding, the federal courts lack subject matter jurisdiction.

IV.

The Appellants' first argument on the merits is that the North Carolina statutory scheme violates the Equal Protection Clause. We hold that it does not. The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . .

deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Generally speaking, the Equal Protection Clause prohibits unreasonable, arbitrary, and invidious classifications. Except in cases where the challenged law employs suspect classifications or significantly burdens a fundamental right, the law comports with the Equal Protection Clause if it is rationally related to a permissible government interest. *Pennell v. City of San Jose*, 485 U.S. 1, 14, 99 L. Ed. 2d 1, 108 S. Ct. 849 (1988). The Appellants argue that a heightened standard of review is applicable in this case because North Carolina's annexation scheme significantly burdens their fundamental right to vote. *See Kramer v. Union Free School District*, 395 U.S. 621, 626-27, 23 L. Ed. 2d 583, 89 S. Ct. 1886 (1969) ("If a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.").

To begin, there is no substantive constitutional right to vote on annexation. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 52 L. Ed. 151, 28 S. Ct. 40 (1907); *Berry v. Bourne*, 588 F.2d 422 (4th Cir. 1978); *Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978); *Muller v. Curran*, 889 F.2d 54 (4th Cir. 1989). So thoroughly a matter of state political concern is annexation that the Supreme Court stated early last century that annexation is "entirely within the power of the state legislature to regulate." *Hunter*, 207 U.S. 178-79, 52 L. Ed. 151, 28 S. Ct. 40. Annexation may be accomplished without any opportunity for a vote, even in the face of fierce opposition from the citizenry; the matter is within "the absolute discretion of the State." *Id.* at 178.

Later decisions, however, have qualified the state's power to some degree, subjecting annexations to some scrutiny under the Fourteenth Amendment. Where the exercise of a state's discretion in ordering its political subdivisions involves the creation of suspect classifications or infringes on fundamental rights, the state action will be upheld only if it furthers a compelling state interest. *Hayward*, 573 F.2d at 190; *Muller v. Curran*, 889 F.2d 54, 56 (4th Cir. 1989) (citing *Hayward*). But this limitation on the state's discretion has not changed the consistent understanding that "there is no basis for an equal protection claim when no one is granted the right to vote on the matter of annexation." *Berry*, 588 F.2d at 424. It is only when the right to vote on a proposed annexation has been granted that "the equal protection clause requires that . . . restrictions on the franchise on grounds other than age, citizenship, and residence can be tolerated only upon proof that it furthers a compelling state interest." *Hayward v. Clay*, 573 F.2d at 190; *see also Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, 16 L. Ed. 2d 169, 86 S. Ct. 1079 ("Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). In this case, no one has been given the right to vote on the annexation proposed by the City of Wilmington.

Given this state of the law, the City appropriately acknowledges and describes the real gravamen of the Appellants' equal protection claim:

> Since there is no constitutional right to vote on annexation, the Appellants' equal protection claim is based on the fact that the General

> Assembly of North Carolina through various local acts has allowed referenda on incorporation, consolidation or annexation in other parts of the state. The Appellants then contend that there must be a compelling state interest for denying them a right to vote on the City's annexation ordinance.

Appellee's Br. at 15.

We think this fails to state a claim under the Equal Protection Clause. There are two ways that annexation can be accomplished in North Carolina. Both are designed to operate uniformly throughout the state. Under N.C. Gen. Stat. § 160A-49, the governing board of a municipality may adopt an annexation ordinance. Under N.C. Gen. Stat. § 160A-21, the General Assembly may adopt a local act setting the boundaries of a municipality, or setting forth the manner in which the boundaries will be determined. These provisions make no classification that singles out any group of North Carolinians for discriminatory treatment regarding the right to vote on annexation. Indeed, neither statute even makes reference to the right to vote.[3] The annexation scheme implements the General Assembly's legitimate determination that boundaries of municipalities (and the accompanying

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[3] The Appellants have also provided no basis for a claim that the legislation was covertly motivated by an invidiously discriminatory purpose. *See Hunter v. Underwood*, 471 U.S. 222, 85 L. Ed. 2d 222, 105 S. Ct. 1916 (1985) (holding unconstitutional a facially race-neutral state constitutional provision disenfranchising persons convicted of crimes involving moral turpitude because motivated by desire to discriminate based on race).

potential desirability of a referendum) should be analyzed by the legislature on a case-by-case basis. The mere fact that the General Assembly has previously used its authority to determine the boundaries of some municipalities by allowing a referendum--presumably when the affected residents petitioned their representatives--does not mean that any annexation thereafter accomplished without a referendum violates North Carolinians' right to the equal protection of the laws. It cannot be seriously maintained that all annexations present the precise problems that would prompt the General Assembly to mandate a referendum. Nothing in the Constitution prohibits states from wisely limiting the exercise of its powers to the needs at hand. *Katzenbach v. Morgan*, 384 U.S. 641, 657-58, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966); *Railway Express Agency v. New York*, 336 U.S. 106, 110, 93 L. Ed. 533, 69 S. Ct. 463 (1949).

Because North Carolina's scheme does not burden a fundamental right or employ a suspect classification, annexation decisions are within "the absolute discretion of the State." *Hunter*, 207 U.S. at 178. Consequently, we do not believe that North Carolina needs to articulate *any* basis for its annexation decisions. But even if we were to undertake rational basis review, there is surely a rational basis for North Carolina's approach to annexation, which delegates the authority to annex to municipalities, but which also provides that the General Assembly may, by local act, determine the manner by which the boundaries of a municipality will be altered. The General Assembly may not have the local knowledge necessary to make a final decision on annexation in some cases where the municipality has not exercised its power. Providing for a vote in such cases would maintain local input. *See, e.g., Thompson v. Whitley*, 344 F. Supp.

480, 485 (E.D.N.C. 1972) (suggesting that General Assembly may conclude that rural, less-densely populated, areas do not have a compelling need for municipal services and that the provision of such services should be subject to a veto by the persons affected). In other cases, however, the General Assembly may find that overriding state concerns make a local referendum unnecessary or undesirable. *See, e.g.*, N.C. Const. art. VII, § 1 (limiting the authority of the General Assembly to incorporate new municipalities in the vicinity of towns and cities; establishing state interest in limiting the number of municipalities providing services in a given area). "We cannot say that judgment [would] not [be] an allowable one." *Railway Express*, 336 U.S. at 110. Moreover, states frequently have a variety of annexation procedures; the need to experiment to find the best procedure is itself a rational basis for the North Carolina law. *Cf. Mixon v. Ohio*, 193 F.3d 389, 403 (6th Cir. 1999) (citing *Sailors v. Kent Board of Educ.*, 387 U.S. 105, 110-111, 18 L. Ed. 2d 650, 87 S. Ct. 1549 (1967) ("Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.")).

V.

The Appellants' next contention is that the district court erred in dismissing their substantive due process claim that North Carolina's annexation scheme violates their fundamental right to vote on annexation. As stated above, there is no such right. *Hunter v. Pittsburgh*, 207 U.S. 161, 52 L. Ed. 151, 28 S. Ct. 40; *Berry v. Bourne*, 588 F.2d 422; *Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978); *Muller v.*

Curran, 889 F.2d 54 (4th Cir. 1989). Accordingly, the district court appropriately dismissed this claim.[4]

VI.

The Appellants next argue that the North Carolina provisions for judicial review of annexation decisions deny them procedural due process. *See* N.C. Gen. Stat. § 160A-50 (providing limited right to judicial review of annexation decision). In order to state a procedural due process claim, the Appellants must demonstrate that "there exists a liberty or property interest which has been interfered with by the State" and that "the procedures attendant upon that deprivation" were constitutionally deficient. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989). The Appellants contend that their "fundamental right to vote on annexation" is a protected liberty interest. As explained above, the Appellants do not have the right to vote on annexation. Consequently, the Appellants have been deprived of no cognizable liberty interest.[5]

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[4] We think *Hunter* also clearly disposes of the Appellants' claims regarding their asserted rights to "intrastate travel" and to "live and work where they will." We reject these claims, and decline to address them further.

[5] We made a similar point in *Baldwin v. City of Winston Salem*, 710 F.2d 132 (4th Cir. 1983). In *Baldwin*, the appellants asserted a right to a judicial forum to challenge an annexation as arbitrary and capricious. We stated:

> Given our conclusion that the Fourteenth Amendment is not violated where, as here, the proposed annexation does not impinge on

Moreover, assuming that the Appellants were deprived of a liberty interest in voting on annexation, that deprivation was caused by the generally applicable annexation scheme enacted by the North Carolina General Assembly. When a legislature passes a law which affects a general class of persons, the political process provides all the process that is

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> fundamental rights or create suspect classifications, there is no right under the Fourteenth Amendment to challenge annexation decisions alleged merely to be arbitrary and capricious. There is, accordingly, no federal right to have state courts hear such challenges to allegedly arbitrary and capricious annexation decisions; the availability of such review is solely a matter of state law.

Id. at 135 n. 3. That the Appellants are here asserting that they were deprived of a fundamental right does not give rise to a right to a judicial forum to pursue that assertion. The right to vote--to the extent it exists and an individual has been deprived of it--is certainly a protected liberty interest, and the Due Process Clause requires fair and adequate procedures if an individual is deprived of his/her liberty. But the Due Process Clause was not meant to require direct judicial review for every mere *assertion* of the deprivation of a (non-existent) liberty interest. The Appellants' suggestion to the contrary puts the cart before the horse. And at any rate, North Carolina courts do permit constitutional challenges on direct review of annexation decisions. *See ante* at 10. So it appears that most of the Appellants already have an entitlement to all the process they are seeking. The only exception would be Sharon Allen, who, because she is not a property owner, has no right to appeal the annexation decision at all. N.C. Gen. Stat. § 160A-50(a). As stated above, she has no cognizable liberty interest, *ante* at 14-15, and she has received all the process that she is due through the legislative system, *post* at 16.

due. As Justice Holmes wrote for the Court in *Bi-Metallic Investment Company v. State Board of Equalization*, 239 U.S. 441, 445, 60 L. Ed. 372, 36 S. Ct. 141 (1915): "General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way they can be in a complex society, by their power, immediate or remote, over those who make the rule." *See also Londoner v. Denver*, 210 U.S. 373, 52 L. Ed. 1103, 28 S. Ct. 708 (1908). Accordingly, we hold that the Appellants have not been deprived of due process of law.

VII.

The Appellants next argue that the district court erred in dismissing its takings claim.[6] There are two categories of government action that are treated as *per se* takings. First, a physical invasion of an owner's property is a taking, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 152 L. Ed. 2d 517, 122 S. Ct. 1465, 2002 U.S. LEXIS 3028, No. 00-1167, slip op. at 18 (U.S. April 23, 2002). Second, regulations that deny all economically beneficial and productive use of land are

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[6] The Takings Clause of the Fifth Amendment applies to the States as well as the Federal Government. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 152 L. Ed. 2d 517, 122 S. Ct. 1465, No. 00-1167, slip op. at 1 n.1 (U.S. April 23, 2002).

compensable takings. *Lucas*, 505 U.S. at 1017; *Tahoe-Sierra*, slip op. at 26; *Front Royal v. Town of Front Royal, Virginia*, 135 F.3d 275, 285 (4th Cir. 1998). It is obvious that neither of these categories apply here. The Appellants complain about the *possibility* of a physical invasion (such as the widening of streets), but the possibility of a taking is not a taking. The Appellants also complain that the annexation has affected their economic interests, but it is apparent that not all productive use of their land has been denied. *Lucas*, 505 U.S. at 1017.

Finally, North Carolina's scheme is not a taking under the Supreme Court's non-categorical approach. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). This is simply not the type of regulation that "goes too far" and is consequently a taking under the Fifth Amendment. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922). The Appellants have not been singled out to bear a burden "which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960).

VIII.

The Appellants next argue that the district court erred in dismissing their claim that the annexation violated the Privileges and Immunities Clause of Article IV, § 2. As an initial matter, we observe that although the Appellants state that their claim is under Article IV, they quote the text of the Fourteenth Amendment's Privileges and Immunities Clause. Appellants' Supp. Br. at 25. Some of the Appellants' argument is also obviously directed at the Fourteenth

Amendment. The two clauses are very different.

In any event, their claim fails under either. The Privileges and Immunities Clause of Article IV is "designed to ensure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395, 92 L. Ed. 1460, 68 S. Ct. 1156 (1948). The Appellants make no argument regarding any discrimination between citizens of different States, nor can we conceive of any. Accordingly, the Appellants have failed to state a claim under Article IV.

The Privileges and Immunities Clause of the Fourteenth Amendment "protects all citizens against abridgement by states of rights of national citizenship as distinct from the fundamental or natural rights inherent in state citizenship." *Madden v. Kentucky*, 309 U.S. 83, 90, 84 L. Ed. 590, 60 S. Ct. 406 (1940). Needless to say, there is no national citizenship right to vote on annexations. *See generally Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73-81, 21 L. Ed. 394 (1872). Accordingly, the Appellants failed to state a claim under the Fourteenth Amendment's Privileges and Immunities Clause as well.

IX.

Finally, the Appellants argue that the district court abused its discretion in denying their joinder motion. The motion sought to join Walter Futch as a plaintiff and the Town of Leland as a defendant. As stated above, the Town of Leland is a separate municipal corporation from the City of Wilmington. Futch is a resident of an area recently annexed by the Town of Leland. Rule 19(a)(2)(i) provides that a

person shall be joined when "the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . as a practical matter, impair or impede the person's ability to protect that interest . . . ." This is simply not the case here. Any interest Futch has relates to the Town of Leland, not Wilmington. The only similarity between the present litigation and Futch's claim is in the issues presented. Nothing impairs Futch's ability to protect his interests, through a separate lawsuit or otherwise. Moreover, joinder in this case would have required new claims and new time for answer, discovery, and motions. By the time of the joinder motion, discovery was scheduled to be completed and dispositive motions filed in three months. Joinder would have seriously delayed the litigation. Accordingly, the district court did not abuse its discretion in denying the motion to join Futch.

X.

For the foregoing reasons, we conclude that the district court did not err in granting the City of Wilmington's motion to dismiss, or in denying the Appellants' joinder motion. Accordingly, the judgment of the district court is affirmed.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA SOUTHERN DIVISION

No. 7 : 00-CV-182-B0 (3)

[Filed January 5, 2001]

OVALEE BAREFOOT, GEORGE WRAGE, NICHOLAS FOKAKIS and SHARON ALLEN Plaintiffs,	)
CITY OF WILMINGTON, Defendant.	)

ORDER

This matter is before the Court on plaintiffs' Motion for a Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure and Movants' Motion to Intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. Upon consideration of the parties' arguments, and for the reasons discussed below, Plaintiffs' Motion will be denied and the Motion to Intervene will be granted.

I. Motion for Preliminary Injunction

I.a. Background

Plaintiffs reside in New Hanover County, North Carolina, in an area of land that was annexed by the city of Wilmington on September 30, 2000 (the "Annexed Area"), pursuant to "An Ordinance to Extend the Corporate Limits of the City of Wilmington Under the Authority Granted by Chapter 160A, Article 4A, Part 3 of the General Statutes of North Carolina" (the "Ordinance"). Plaintiffs filed a Complaint and Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction in this Court on September 29, 2000, alleging that N.C.G.S. §§ 160A-45 et seq. (the "Annexation Statute") ,which delineates the procedure for passing the Annexation Ordinance, violates their Equal Protection rights under the Fourteenth Amendment and that the Annexation Ordinance is therefore invalid. Plaintiffs' Motion for Temporary Restraining Order was denied by this Court's Order of October 31, 2000. The Court held a hearing on November 20, 2000 on the Preliminary Injunction issue and it is ripe for ruling.

I.b. Analysis

"'[A] preliminary injunction is an extraordinary remedy, to be granted only if the moving party clearly establishes entitlement to the relief sought," *Hughes Network Sys., Inc. v. InterDigital Communications Corp.*, 17 F.3d 691, 693 (4th Cir. 1994) (quoting *Federal Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 499 (4th Cir. 1981)). Preserving the *status quo* pending adjudication on the merits is its purported aim. *See Blackwelder Furniture Co.v. Seilig Manufacturing Co.*, 550 F.2d 189, 195 (4th Cir. 1977). The

Fourth Circuit standard for awarding interim injunctive relief is the "balance-of-hardships" test. *Id.*, at 196; *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir. 1991). Under this test, the Court determines whether the harm likely to be suffered by plaintiff if relief is denied is actual and imminent or merely remote and speculative. *Direx Israel, Ltd.* 952 F.2d at 812 (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2nd Cir. 1989)) . It then balances this harm or injury against the harm to the defendant if the relief is granted.

On the basis of this balancing, the court then "determine[s] the degree by which a 'likelihood of success' on the merits must be established before relief may issue." *Direx Israel*, 952 F.2d at 811. A "substantial discrepancy in potential harms would have to be found to favor a party whose potential for success on the merits was no better than even," while a smaller discrepancy may suffice when that party has a strong probability of success on the merits. *Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993) ; *Blackwelder*, 550 F.2d at 195. Finally, the court must consider the public interest.

The "hardship" considerations are the most important in the analysis. *Direx Israel*, 952 F.2d at 812. At all times, plaintiff bears the burden of establishing that a preliminary injunction is warranted. *Id.*

In this case, Plaintiffs argue that their equal protection rights have been violated and that such a violation constitutes irreparable harm as a matter of law.'" Plaintiffs' Reply Memorandum at 3. However, Plaintiffs have not supported their claim that the North Carolina annexation statute in fact

violates Plaintiffs' constitutional rights. Therefore, the Court finds that the balance of hardships favors Defendant.

"[T]he burden of establishing the unconstitutionality of a statute rests on him who assails it."*Metropolitan Cas. Ins. Co. of New York v. Brownell*, 294 U.S. 580; 584, 55 S.Ct. 538 540 (1934) . Although the "right to vote" may be fundamental in some contexts, Plaintiffs have failed to show that the right to vote on a *proposed annexation* is a "fundamental right" for purposes of equal protection analysis. This is consistent with the settled principle that a "state ... at its pleasure, may ... expand or contract the territorial area, unite the whole or a part of it with another municipality with or without the consent of the citizens, or even against their protest." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79, 28 S.Ct. 40, 46 (1907). Moreover, absent infringement of a "fundamental right", "[a] statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Id.* The Ordinance at issue here is likely to survive a rational basis test. Therefore, the balance of hardships favors Defendant. The City of Wilmington has extended a number of utilities and safety services to the Annexed Area as a result of annexation. Issuing a preliminary injunction in this case would disrupt such services, contracts and investments, imposing significant financial and administrative burden on Defendant.

Given that Plaintiffs have failed to establish a substantial likelihood of success, that the balance of hardships weighs toward Defendant, this Court finds that it is in the best interest of the public and Defendant to deny Plaintiffs' Motion for Preliminary Injunction.

II. Motion to Intervene

II.a. Background

On October 31, 2000, several owners of real property in the Annexed Area (the "Movants") filed a Motion to Intervene as of Right, pursuant to Rule 24(a) of the Federal Rules, or , alternatively, by permission of the Court, pursuant to Rule 24(b) of the Federal Rules.

A movant may intervene as of right pursuant to Rule 24(a) (2)[1] upon filing a timely motion and upon demonstrating (i) a bona fide interest in the subject matter of the acttion, (2) that disposition of the action may impede its ability to protect that interest, and (3) that the existing parties to the action will not adequately represent or protect the movant's interests. *Newport News Shipbuilding and Drydock Co. v. Peninsula Shipbuilders' Ass'n*, 646 F.2d 117, 120 (4th Cir. 1981).

Filed one month after the start of this litigation, Movants motion is timely in this case. Their motion also satisfies the first two prongs of the test for intervention as of right. First Movants are similarly situated to the original Plaintiffs, as they are residents of the Annexed Area and have an interest in protecting their rights as residents thereof. Second, in light of the doctrines of res judicata and collateral estoppel, the disposition of Plaintiffs' instant action may

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[1] Movants do not argue, nor does the Court find, any statute of the United States that confers an unconditional right to intervene and therefore, Rule 24 (a) (1) of the Federal Rules of Civil Procedures is inapplicable.

impede the Movants ability to protect their interests in future litigation.

However, Movants' Motion to Intervene fails the third requirement for intervention as of right, because the existing Plaintiffs adequately represent and protect the Movants' interests. Movants claim that the "existence of potential claims" additional to those asserted by Plaintiffs make Plaintiffs' representation inadequate. Movants also state that, although they would "desire" to appeal an adverse ruling by this Court, they "verily believe" that the existing Plaintiffs "would be unable financially, or perhaps unwilling, to prefect such an appeal." Movants' Memorandum of Law in Support of Motion to Intervene at 10. However, this conjecture does not demonstrate that Plaintiffs are inadequate or fail to represent Movants' interests by Plaintiffs. Furthermore, given that Movants' interests are otherwise identical to those of Plaintiffs, and that Plaintiffs have vigorously represented those interests, the Court is not convinced that Plaintiffs' representation is inadequate in the present in this case.

However, the Court has broad discretion to permit Movants to intervene under Rule 24(b) of the Federal Rules of Civil Procedure. *Black v. Central Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974) . Permissive intervention is appropriate in circumstances in which: (1) the application is timely; (2) the moving party's action and the main action have a common question of law or fact; and (3) the proposed intervention will not unduly delay or prejudice the adjudication of the original parties' rights. *Hill v. Western Electric Co.*, 672 F.2d 381, 386 (4th Cir. 1982).

As discussed above, Movants' Motion is timely. Movants' petition also satisfies prong two, in that their claims encompass common questions of law and fact. Finally, allowing the intervention will not unduly prejudice adjudication of the original parties' rights. The Court, in its discretion, therefore permits Movants to intervene pursuant to Rule 24(b).

CONCLUSION

For the foregoing reasons, the Court hereby DENIES Plaintiffs' Motion for Preliminary Injection and GRANTS Movants' Motion to Intervene.

SO ORDERED.

This 4th day of January, 2002.

/s/ _____
TERRENCE W. BOYLE
CHIEF UNTIED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
SOUTHERN DIVISION

[Filed September 7, 2001]

No. 7:00-CV-182-BO(3)

OVALEE BAREFOOT, GEORGE WRAGE, NICHOLAS FOKAKIS and SHARON ALLEN	)
Plaintiffs,	)
v.	)
CITY OF WILMINGTON,	)
Defendant.	)

ORDER

This case is before the Court on Plaintiffs' and Intervener-Plaintiffs' Joint Motion for Joinder; Defendant's Motions to Dismiss Plaintiffs' and Plaintiff-Interveners' claims; and Plaintiffs' and Intervener-Plaintiffs' requests for declaratory and permanent injunctive relief. All of the issues have been fully briefed and are ripe for ruling.

BACKGROUND

Plaintiffs and Intervenor-Plaintiffs reside in New Hanover County, North Carolina. Plaintiffs and Intervenor-Plaintiffs all own property in an area of land (the "Annexation Area") that was proposed for annexation by the city of Wilmington. On June 2, 1998, the City adopted "An Ordinance to Extend the Corporate Limits of the City of Wilmington Under the Authority Granted by Chapter 160A, Article 4A, Part 3 of the General Statutes of North Carolina" that was to become effective on August 31, 1998. However, residents of the Annexation Area, including Plaintiff Ovalee Barefoot, petitioned for review of the Annexation Ordinance pursuant to N.C. Gen. Stat. § 160A-50. Accordingly, the Annexation was stayed until the final judgment of the state courts had been entered.

On April 18, 2000, the North Carolina Court of Appeals upheld the City's Annexation Ordinance. On August 24, 2000, the North Carolina Supreme Court denied discretionary review of the Court of Appeals' decision. the North Carolina Supreme Court's decision constituted a final judgment of the appellate division. Accordingly, the Annexation became effective on September 30, 2000.

Plaintiffs filed a Complaint and Motions for Temporary Restraining Order and Preliminary and Permanent Injunctions in this Court on September 29, 2000, in which they alleged that the Annexation Ordinance was invalid. Plaintiffs argued that N.C.G.S. §§ 160A-45 et seq. (the "Annexation Statute"), which outlines the procedure for passing the Annexation Ordinance, violated their Equal Protection rights under the Fourteenth Amendment. Plaintiffs'

Motion for Temporary Restraining Order was denied on October 31, 2000, and Motion for Preliminary Injunction was denied on January 5, 2001. Plaintiff-Interveners' Motion to Intervene was granted on January 5, 2001.

On October 11, 2000, Defendant filed a Motion to Dismiss Plaintiffs' Complaint. On February 5, 2001, Defendant filed a Motion for Permanent Injunction and Plaintiffs' and Plaintiff-Interveners' Motion for Joinder, have been fully briefed and are ripe for ruling.

ANALYSIS

1. Plaintiffs and Intervener-Plaintiffs' Joint Motion for Joinder

Plaintiffs and Intervener-Plaintiffs (hereinafter "Movants") have moved to join to this action Walter B. Futch, Jr. ("Futch") and the Town of Leland ("Leland") as a plaintiff and a defendant, respectively. Futch is the resident of an area of land that has been proposed to be annexed by the Town of Leland, pursuant to the Annexation Statute. Movants claim that Futch and Leland are "necessary" parties to this action and must therefore be joined under Rule 19 of the Federal Rules of Civil Procedure. In the alternative, Movants ask that Futch and Leland be permitted to be joined to the action.

Movants' Motion will be denied, as the absence of Futch and Leland will in no way preclude relief as between the existing parties. Nor will the disposition of the instant action impair or impede Futch's ability to protect his own interests. His independent claims against Leland will not be

precluded, by either the doctrine of collateral estoppel or res judicata. Moreover, joining the additional parties would unnecessarily delay the resolution of the case before the Court, as the instant motions have already been fully briefed and are ripe for adjudication. For these reasons, Plaintiffs' and Intervener-Plaintiffs' Motion will be denied.

2. Defendant's Motion to Dismiss Plaintiffs' Claims

A Motion to Dismiss for failure to state a claim pursuant to Rule 12(b)(6) should be granted when "it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief." *Mylan Laboratories, Inc. v. Matkari* 7 F.3d 1130, 1134 (4th Cir. 1993). "In considering a motion to dismiss, the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Id.*

Defendant has moved to dismiss Plaintiffs' constitutional challenges to N.C, Gen. Stat. § 160A-49, the General Assembly's exercise of annexation by local act, and N.C. Gen. Stat. § 160A-50 for failure to state a clam. The Court will address each of these claims in turn.

a. N.C. Gen. Stat. § 160A-49

Plaintiffs first allege that they were denied equal protection of the laws when they were denied a right to vote on the decision to annex their land to the City of Wilmington. Under N.C. Gen. Stat. § 160A-49, the governing board of a municipality seeking to annex surrounding areas must meet certain requirements prior to adopting an annexation ordinance, such as the Ordinance at issue in this case. For

example, the board must hold a public hearing on the matter and must provide a statement of their intent to provide services to the area being annexed. Once those and other requirements are met, however, the municipal governing board "[has the] authority to adopt an ordinance extending the corporate limits of the municipality to include all, or such part, of the area described in the notice of public hearing." N.C. Gen. Stat. § 160A-49(e). Because Section 160A-49 requires no vote of the residents of the area of proposed annexation, Plaintiffs claim that the Annexation Statute violates the Equal Protection Clause.

The Fourteenth Amendment's Equal Protection Clause provides that "[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend, XIV, § 1. The Clause thus "limits *all* state action, prohibiting any state from denying a person equal protection through the enactment, administration, or enforcement of its laws and regulations." *Sylvia Dev. Corp. v. Calvert County Md.*, 48 F.3d 810, 818 (4th Cir.1995) (emphasis in original).

As an initial matter, Plaintiffs are not entitled to relief under the Equal Protection Clause because annexation challenges are not protected by the Fourteenth Amendment. As the Supreme Court noted in *Hunter v. Pittsburgh*, 207 U.S. 161, 178, 28 S.Ct 40, 45 (1907)[1], States have "absolute discretion" to confer to municipalities the "power to acquire, hold, and manage personal and real property." *Id.* Moreover, the State, or a municipality exercising such powers as have been delegated by the State, "at its pleasure, may... expand

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[1] The Fourth Circuit has made it clear that *Hunter* is still good law. *See Berry v. Bourne*, 588 F.2d 422 (4th Cir. 1978).

or contract the territorial area, unite the whole or a part of it with another municipality..." and may do so "conditionally or unconditionally, with or without the consent of the citizens, or *even against their protest.*" *Id.* (emphasis added).

Given that the State, or by delegation, a municipality, has such powers, "challenges to annexations generally are not actionable under the Fourteenth Amendment" *See Raintree Homeowners Ass'n. Inc. v. city of Charlotte*, 543 F.Supp. 625, 629 (D.C.N.C. 1982). Moreover, although exceptions have been recognized in limited circumstances, such as when an annexation decision is made on the basis of race, *Gomillion v. Lightfoot*, 364 U.S. 339, 345, 81 S.Ct. 125, 129, 5 L.Ed.2d 10 (1960), the instant case involves no such considerations.

Even if the Annexation Statute is analyzed under the Fourteenth Amendment, however, it must be sustained. The Annexation Statute as issue does not burden a fundamental right or employ a suspect classification.[2] Legislation such as the Annexation Statute that neither employs a suspect class nor burdens a fundamental right "is accorded a strong

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[2] Although Plaintiffs claim that the Statute burdens their "fundamental right to vote [on the annexation]" and their "fundamental right of liberty," the law provides no basis for their arguments. It is well-settled that there is no fundamental right to vote on land annexation decisions. *See Hunter v. Pittsburgh*, 207 U.S. at 52 (stating that "annexation rests in the discretion of the legislature '[i]n the absence of constitutional restrictions...'") Therefore, no fundamental rights were violated by the Statute. Accordingly, its constitutionality shall be considered under the "rational basis" test.

presumption of validity," *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993), and "must be upheld against equal protection challenge if there is any reasonable conceivable state of facts that could provide a rational basis for the classification," *Beach Communications, Inc.*, 508 U.S. at 313, 113 S.Ct. at 2101.

To determine the constitutionality of the Annexation Statute, this Court must therefore apply the "rational basis" test. *See Morgan v. City of Florissant*, 147 F.3d 772, 774 (8th Cir. 1998) (applying rational basis review to a state's annexation scheme). Rational basis analysis requires the Court to consider whether a statute is "rationally related" to a legitimate governmental interest. *See Plyler v. Moore*, 100 F.3d 365, 373 (4th Cir. 1996). Under rational basis scrutiny, "'[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.'" *Tuan Ahn Nguyen v. I.N.S.*, 121 S.Ct. 2053, 2067 (2001). Plaintiffs have presented no evidence that the Annexation Statute is in any way "irrational." Instead, it is a valid delegation of the State's annexation power to municipalities. Because it meets the rational basis test, the Annexation Statute does not offend the Fourteenth Amendment's Equal Protection Clause and Plaintiffs' challenge thereto must fail.

b. Annexation by "Local Act"

Plaintiffs' second Equal Protection claim challenges the State's annexation scheme on the basis that it is not uniformly enforced on all residents of North Carolina. Plaintiffs apparently object to the "local act" legislation set

forth at N.C. Gen. Stat. § 160 A-21 (1999). Section 160A-21 provides that "[t]he boundaries of each city shall be those specified in its charter with any alterations that are made from time to time in the manner provided by law or by local act of the General Assembly." N.C. Gen. Stat. § 160A-21 (1999). Under this Statute, the North Carolina General Assembly, by local act, may allow referenda on annexations done in various parts of the state.[3] In so doing, the General Assembly may give some persons the right to vote on proposed annexations. Plaintiffs claim that this is disparate treatment that violates their Equal Protection rights.

Although certain local acts of the General Assembly, done under N.C. Gen. Stat. § 160 A-21, have provided for annexation referenda to be taken in some cases, Plaintiffs' equal protection rights have not been violated. As previously discussed, "[t]he state, at its pleasure, may expand or contract

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[3] This is a different annexation mechanism than the method employed by the City of Wilmington in the instant case. Under North Carolina's Annexation scheme, *cities* may extend their corporate limits through the services and Standards Method authorized by Parts 2 and 3 of Article 4A of Chapter 160A of the North Carolina General Statutes. Part 2 establishes the procedure for annexation by cities with populations of less than 5,000 persons and Part 3 establishes the same procedure for cities with populations of more than 5,000 persons. In this case, the City of Wilmington effected the annexation of the Annexed Area by following the procedures set forth in Part 3. These annexation procedures set forth in Part 3. These annexation procedures govern the course of an annexation done by a *municipality*. By contrast, N.C. Gen. Stat. § 160A-21 provides a means by which the *General Assembly* may effect the annexation of an area of land, i.e., by local act.

the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation...[all] without the consent of the citizens, or even against their protest." *Hunter v. Pittsburgh*, 207 U.S. 161, 178-79 (1907). Indeed, the States have "extraordinarily wide latitude...in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978).

In this case, the State of North Carolina has provided for two different methods of annexation, one which is done by the municipality itself and one which is done by local act of the General Assembly. As Plaintiffs have correctly noted, annexations done by a municipality, which has been granted such power from the State of North Carolina, do not require the vote of the residents of the area to be annexed. By contrast, when an annexation is proposed by the General Assembly and done by local act, it may involve a referendum of the residents of the annexation area.

Although this scheme does revolve two different annexation procedures, it does not violate Plaintiffs' Equal Protection Rights. The fact that the General Assembly requires municipalities to follow a different annexation procedure than it must follow is clearly a rational decision based on the State's legitimate interests. Indeed, it is a valid exercise of the State's power to "expand or contract the territorial area, unite the whole or a part of it with another municipality...", as well as its "absolute discretion" to confer to municipalities the "power to acquire, hold, and manage personal and real property." *Hunter v. Pittsburgh,* 207 U.S. 161, 178, 28 S.Ct, 40, 46 (1907). The Annexation scheme is

clearly rational and must be upheld as a constitutional exercise of the State's powers.

c. N.C. Gen. Stat. § 160A-50

In their last equal protection claim, Plaintiffs argue that N.C. Gen. Star § 160A-50 violates their equal protection rights by limiting the right to appeal an annexation decision only to those persons who: (1) "own[] property in the annexed territory"; and (2)"believe that [they] will suffer material injury" as a result of the municipality's failure to comply with certain procedural requirements. *See* N.C. (Gen. Stat. § 160A-50.

As an initial matter, Plaintiffs' complaint with respect to the geographical limitation must be dismissed for their lack of standing. As Plaintiffs admit in their Complaint, "Plaintiffs are [all] residents of New Hanover County, North Carolina and own property, both real and personal, within the area described in the... ordinance of annexation...". Complaint ¶ 1. It is well-settled that "a party seeking review must allege facts showing that he is himself adversely affected. . ." *Sierra Club v. Morgon,* 405 U.S. 727, 740 (1972). The exercise of this Court's judicial power is thus limited to "restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982). Therefore, as Plaintiffs have suffered no injury from the above Statute, Plaintiffs' claim must be dismissed.

Even when considered on the merits, however, Plaintiffs' claim under the Equal Protection Clause must fail.

The right to appeal an annexation decision is clearly not a "fundamental" right. *See supra*. Moreover, extending the right to appeal only to those who live in the annexed area and are "materially injured" by the municipality's failure to follow procedural requirements is clearly a rational and legitimate distinction of the State. In limiting the right to appeal, the State merely narrowed the scope of a process that is costly and potentially cumbersome. Thus, the Statute furthers the Government's interest in insuring that beneficial annexation decisions proceed in an efficient manner and are not unnecessarily caught up in the courts. Section 160A-50 therefore withstands equal protection scrutiny under the rational basis test Plaintiffs' challenge to the Statute must therefore be dismissed.

3. Defendant's Motion to Dismiss Plaintiff-Interveners' Claims

Defendant has also moved to dismiss Plaintiff-Interveners' constitutional claims, each of which will be addressed in turn.

a. Due Process claim

Interveners claim that the Annexation Statute infringes the due process rights in that it fails to provide them with a right to vote on annexation decisions and limits the scope of appeal of annexation decisions to issues of procedural compliance. Interveners further claim that, because the Annexation Statute is unconstitutional, the Annexation Ordinance, which was adopted pursuant to the Statute, is invalid and of no legal effect.

However, as discussed above, "[t]he United States Supreme Court has recognized very broad powers in the state concerned over annexations proceedings." *See Carlvn v. City of Akron*, 726 F.2d 287, 288 (6th Cir. 1984). Indeed, it is undisputed that there is no fundamental right to vote on annexations founded in the Due Process Clause of the Constitution or any other source. *See Adams v. City of Colorado Springs*, 308 F.Supp, 1397, 1403 (D.C. Colo. 1970), *aff'd* 399 U.S. 901 (1970) ("[T]here is no absolute constitutional right under the due process clause of the Fourteenth Amendment to vote on a proposed annexation"). Therefore, Plaintiff-Interveners only have a right to vote on annexations, or to appeal such decisions to the extent that the State of North Carolina has extended such right to them. For these reasons, their due process rights have not been violated and they have failed to state a claim under the Fourteenth Amendment.

b. Equal Protection Claim

Interveners re-plead the claim made by the original Plaintiffs, that the Annexatiom Statute and enabling legislation violate their rights under the Equal Protection Clause. However, for the reasons discussed above, Interveners' claim must fail because the Annexation Statute and other legislation in question pass muster under the rational basis test.

c. Right to Travel claim

On a variation of Plaintiffs' .Equal Protection claim, Interveners also make a claim that their "right to travel" has been violated "because North Carolina's forcible annexation scheme has not been applied uniformly statewide,"

Interveners' Complaint ¶ 17. Again, Interveners apparently object to local, act legislation that allows residents of areas of proposed annexation to participate in a referendum on the annexation issue.

Although "[t]he word 'travel' is not found in the text of the Constitution," the Supreme Court has found the right to be "firmly embedded in our jurisprudence." See Saenz v. Roe, 119 S.Ct 1518, 1524 (1999). [4] The Supreme Court has enunciated three different components of the fight to travel, which include: (1) the right of a citizen of one State to enter and to leave another State; (2) the right to be treated as a welcome visitor rather than an alien when temporarily present in the second State; and (3) "their right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." *See id.* at 1525.

In this case, nothing in Plaintiff-Interveners' Complaint indicates that their rights have been infringed in entering or leaving the State of North Carolina, that they have ever been "temporarily" present in the state (or treated as "aliens" during such period) or that they are "newly arrived." citizens who have been discriminated against as such. Given that Plaintiff-Interveners have failed to plead anything cognizable as a "right to travel" claim, their claim that such right was unconstitutionally violated must be denied.

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[4] Specifically, in *Saeaz v. Roe*, the Supreme Court noted that the second component was provided for under the Privileges and Immunities Clause of Article IV of the Constitution and that the third component was expressly provided for under the Privileges and immunities Clause of the Fourteenth Amendment. *See Saeaz* 119 S.Ct at 1525, I526-27.

d. Privileges and Immunities claim

Next Plaintiff-Interveners claim that the Annexation Statute is unconstitutional as it violates their privileges and immunities in contravention of Article IV of the United States Constitution. Plaintiff-Interveners have no basis for this claim, as the Privileges and Immunities Clause of Article IV "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395, 68 S.Ct. 1156, 1161 (I948). The Clause is simply inapplicable in this case, as none of the Plaintiffs or Intervener-Plaintiffs has been discriminated against on the basis of being a non- or new-resident of North Carolina (or of any other state, for that matter). Plaintiff-Interveners' claim under the Privileges and Immunities Clause of Article IV must therefore be denied.

4. Plaintiffs' and Intervener-Plaintiffs' Request for Permanent Injunction.

Plaintiffs and Intervener-Plaintiffs have requested both declaratory and injunctive relief in this action. As discussed in the Court's previous order, in determining whether to grant preliminary injunctive relief, the Court employs the "hardship balancing test." *See Cannon v. North Carolina State Bd. of Educ.*, 917 F. Supp. 387, 390 (E.D.N.C, 1996) (citations omitted). Under that test, the Court weighs the balance of harms to plaintiff and defendant, the likelihood of success on the merits, and the public interest. *See Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4'h Cir. 1992). The harm to plaintiff and defendant are the most important considerations in the analysis. *See id.*

The question ia this case is whether permanent injunctive relief is warranted. To determine the appropriateness of awarding permanent injunctive relief, the Court must employ the same hardship balancing test described above, only it must consider Plaintiffs' actual success on the merits, as opposed to the likelihood thereof.

As the Court noted in its previous Order, the balance of hardships in this case favors Defendant. The annexation has been effective for more than ten months, so that Defendant has already spent significant time and financial resources in extending emergency services aad various utilities services to the Annexed Area. The law does not support the claim made by the residents of the Annexed Area that their constitutional rights have been violated in any way. Therefore, the relative harm to them of allowing the Annexation to stand is less pronounced. Moreover, because their constitutional rights have not been infringed, Plaintiffs' and Intervener-Plaintiffs' claims have been unsuccessful. These factors, along with considerations of the public interest, require this Court to deny their request for permanent mjtmctive relief.

CONCLUSION

For all the foregoing reasons, the Court hereby DENIES Plaintiffs' and Intervener-Plaintiffs' Joint Motion for Joinder, GRANTS Defendant's Motions to dismiss, and DENIES Plaintiffs' and Intervener-Plaintiffs' requests for declaratory judgment and injunctive relief. Accordingly, Plaintiffs' and Intervener-Plaintiffs' claims are hereby dismissed in their entirety.

SO ORDERED.

This 6th day of September, 2001.

/s/ _____
TERRANCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NORTH CAROLINA SOUTHERN DIVISION

[Filed September 7, 2001]

No.7:00-CV-182-BO(3)

OVALEE BAREFOOT, GEORGE WRAGE, NICHOLAS FOKAKIS, SHARON ALLEN, *Plaintiffs*, and	)
ALGERNON LEE BUTLER, JR. and wife SUSAN DEIBERT BUTLER., JOHN ELLIS BRYANT, and wife SHERRY WILLIAMS BRYANT, THEODORE HERRING HEWLETT, SR., and wife, ANN JOYCE HEWLETT, WILLIAM ADDISON HURST, and wife LILLIAN WILLIAMSON HURST, MILES CREAMER HIGGINS, and wife MARGARET GLENDY WILLIARD HIGGINS, MILES CREAMER HIGGINS, III, COLLEEN MITCHEL HIGGINS, JANET MOORE HICKS, JOHN RUSSELL HICKS, and wife CAROLYN TIMMS HICKS, ALBERT EMERSON WILLARD, and wife. ELIZABETH WHITE WILLARD, MARTIN STEVENSON WILLARD, and wife, GABRIELLE HOLMES WILLARD, RICHARD BENTLEY WALDKIRCH, and wife, CAROL WELCH WALDKIRCH, SALLY HICKS REARDON, WILLIAM	)

MARTIN WILLARD, THOMAS LEO)
JOYCE, and wife SUZANNE SPENCE)
JOYCE, JOHN JAMES ORMOND,)
DAVID LEWIS ORMOND,)
MARY CAIN ORMOND,)
CLAUDE HUNTLEY MCALLISTER, JR.,)
and wife, NANCY HARDACRE)
MCALLISTER, KEVIN SLEAN SCULLY,)
and wife, MADELINE MARGURITE)
SCULLY, HARRIETT RIEMAN, JACK A.)
ALFORD, ALLAN L. ANTES, and wife)
JANE L. ANTES, JOSEPH F.)
AUGUSTINE, and wife, CAROLYN R.)
AUGUSTINE, ROBERT C. BOWEN, SR.,)
and wife, MARY L. BOWEN, JULIAN H.)
BRADBERRY, JR., and wife, MARY A.)
BRADBERRY, VANDER M.)
CLEMMONS, MURRAY J, DEGNAN,)
and wife, GLORIA R. DEGNAN,)
GEORGE DITCHEOS, and wife,)
BARBARA DITCHEOS, ROBERT L.)
DOWNING, and wife, BARBARA J.)
DOWNING, HENRY P. DOZIER, and)
wife, FRANCES M. DOZIER, GARY D.)
GALLOWAY, and wife, JENNIE)
GALLOWAY, GREGORY V.)
GIAMMALVO, and wife, GLORIA J.)
GIAMMALVO, WILLIAM B. HAVERTY,)
and wife, EDNA B. HAVERTY, KEVIN J.)
HOBAN, and wife, MICHELLE HOBAN,)
CHARLES E. HORTON, WILLIAM S.)
HOWELL, and wife, MOLLY HOWELL,)
FLOYD P. KIRBY, and wife, LINDA N.)
KIRBY, CLIFF C. MABRY, JR., and wife)
MARTY MABRY, C. ROY MALLOTT,)

RICHARD H. MARSTON, JR., and wife, JOAN P. MARSTON, HUGH ALEXANDER MCEACHERN, JR., and wife, MARY MCEACHERN, JOHN V. METTS, and wife, SUSAN METTS, RICHARD L, PENNINGTON, and wife BESSIE G. PENNINGTON, KARL O. PIERCE, and wife, JUDY PIERCE, JOEL T. PINER, H. VAN REID, and wife, DOROTHY B. REID, JAMES W. ROUSE, JR., and wife, JANIS M. ROUSE, PHILLIP A. SCARRELL, MONA R. SMALLEY, KENNETH SMITH, and wife, PAULA SMITH, EDWIN E. SPENCER, and wife, MONICA R. SPENCER, HOWARD J. TALLEY, and wife, BETSEY TALLEY, GUSTAVE J. VAN NYNATTEN, and wife, JOANNA P. VAN NYNATTEN, RICHARD L. WOODBUKY, and wife SUZANNE M. WOODBURY, BARBARA D'EMELIO, HERCHEL E. ROGERS, and wife, JULIA P. ROGERS, JOHN C. BYRNES, III, and wife, MARGARET J. BYRNES, ROBERT E. DOYLE, JAMES RAYBURN, and wife, SARAH RAYBURN, CATHERINE C. TAMISIEA, DANIEL I. FILOMENA, and wife CATHERINE FILOMENA, KIRK A. HOWARD, and wife, BARBARA A. HOWARD, J, DON BULLARD, and FAYDENE S. CORBETT,

Intervener-Plaintiffs,

v.)
)
CITY OF WILMINGTON,)
Defendant and)
Intervener-Defendant.)
)

JUDGMENT

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that the Court hereby **DENIES** Plaintiffs' and Intervener-Plaintiffs' Joint Motion for Joinder, **GRANTS** Defendant's Motions to Dismiss, and **DENIES** Plaintiffs' and Intervener-Plaintiffs' requests for declaratory judgment and injunctive relief. Accordingly, Plaintiffs' and Intervener-Plaintiffs' claims are hereby dismissed in their entirety. (Boyle, J)

THIS JUDOMENT FILED AND ENTERED ON SEPTEMBER 7, 2001 AND COPIES TO:

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September 7, 2001

/s/_____
DAVID W. DANIEL, CLERK
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
SOUTHERN DIVISION

[Filed September 21, 2001]

Civil Action No. 7-00-CV-182-B03

OVALEE BAREFOOT, GEORGE WRAGE,)
NICHOLAS FOLKAKIS and SHARON ALLEN,)
Plaintiffs, and)
)
ALGERON LEE BUTLER, JR. and wife,)
SUSAN DEIBERT BUTLER; JOHN ELLIS)
BRYANT and wife, SHERRY WILLIAMS)
BRYANT; THEODORE HERRING HEWLETT,)
SR. and wife, ANN JOYCE HEWLETT;)
WILLIAM ADDISON HURST and wife,)
LILLIAN WILLIAMSON HURST; MILES)
CREAMER HIGGINS and wife, MARGARET)
GLENDY WILLARD HIGGINS; MILES)
CREAMER HIGGINS, III and wife, COLLEEN)
MITCHEL HIGGINS; JANET MOORE HICKS;)
JOHN RUSSELL HICKS and wife, CAROLYN)
TIMMS HICKS; ALBERT EMERSON)
WILLARD and wife, ELIZABETH WHITE)
WILLARD; MARTIN STEVENSON WILLARD)
and wife, GABRIELLE HOLMES WILLARD;)
RICHARD BENTLEY WALDKIRCH and wife,)
CAROL WELCH WALDKIRCH; SALLY)
HICKS REARDON; WILLIAM MARTIN)
WILLARD; THOMAS LEO JOYCE and wife,)
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ORMOND; DAVID LEWIS ORMOND; MARY)

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McALLISTER, JR. and wife, NANCY)
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L. ANTES; JOSEPH F. AUGUSTINE and wife,)
CAROLYN R. AUGUSTINE; ROBERT C.)
BOWEN, SR. and wife, MARY L. BOWEN;)
JULIAN H. BRADBERRY, JR. and wife, MARY)
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L. DOWNING and wife, BARBARA J.)
DOWNING; HENRY P. DOZIER and wife,)
FRANCES M. DOZIER; GARY D.)
GALLOWAY and wife, JENNIE GALLOWAY;)
GREGORY V. GIAMMALVO and wife,)
GLORIA J. GIAMMALVO; WILLIAM B.)
HAVERTY and wife, EDNA B. HAVERTY;)
KEVIN J. HOBAN and wife, MICHELLE)
HOBAN; CHARLES E. HORTON;)
WILLIAM S. HOWELL and wife, MOLLY)
HOWELL; FLOYD P. KIRBY and wife, LINDA)
N. KIRBY; CLIFF C. MABRY, JR and wife,)
MARTY MABRY; C. ROY MALLOTT;)
RICHARD H. MARSTON, JR. and wife, JOAN)
P. MARSTON; HUGH ALEXANDER)
McEACHERN, JR. and wife, MARY LOU)
McEACHERN; JOHN V. METTS and wife,)
SUSAN METTS; RICHARD L. PENNINGTON)
and wife, BESSIE G. PENNINGTON; KARL O.)
PIERCE and wife, JUDY PIERCE; JOEL T.)
PINER; H. VAN RIED and wife, DOROTHY B.)
REID; JAMES W. ROUSE, JR. and wife,)

JANIS M. ROUSE; PHILLIP A. SCARRELL; MONA R. SMALLEY; KENNETH SMITH and wife, PAULA SMITH; EDWIN E. SPENCER and wife, MINICA R. SPENCER; HOWARD J. TALLEY and wife, BETSEY TALLEY; GUSTAVE J. VAN NYNATTEN and wife, JOANNA P. VAN NYNATTEN; RICHARD L. WOODBURY and wife, SUZANNE M. WOODBURY; BARBARA D'EMELIO; HERCHEL E. ROBERS and wife, JULIA P. ROGERS; JOHN C. BYRNES, III and wife, MARGARET J. BYRNES; ROBERT E.DOYLE; JAMES RAYBURN and wife, SARAH RAYBURN; CATHERINE C. TAMISIEA; DANIEL J. FILOMENA and wife, CATHERINE FILOMENA; KIRK A. HOWARD and wife, BARBARA A. HOWARD; J. DON BULLARD; AND FAYDENE S. CORBETT,

Interveners,

vs.

CITY OF WILMINGTON

Defendant.

NOTICE OF APPEAL

Notice is hereby given, that all Plaintiffs and all Interveners in the above-encaptioned case, hereby appeal to the United States Court of Appeals for the Fourth Circuit, a Judgment and Order denying Plaintiffs' and Interveners' Joint Motion for Joinder, granting Defendant's Motions to Dismiss, denying Plaintiffs' and Interveners' requests for declaratory

and injunctive relief, and dismissing Plaintiffs' and Interveners' claims in their entirety. The Judgment and Order appealed from herein were entered and filed on September 7, 2001.

Respectfully submitted this 21st day of September, 2001.

THE ELDRIDGE LAW FIRM, P.C.

By: /s/ _____

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CERTIFICATE OF SERVICE

This is to certify that the undersigned, in accordance with the provisions of Rule 25(b) of the Federal Rules of Appellate Procedure, has this date duly served the foregoing "Notice of Appeal" upon Defendant in the pending action via hand delivery of an exact copy of the same to the following:

Counsel for Defendant
Thomas C. Pollard, Esq.
WILMINGTON CITY ATTORNEY
102 North 3rd Street
Wilmington, NC 28401

This the 21st day of September, 2001.

THE ELDRIDGE LAW FIRM, P.C.

By: /s/ _____
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APPENDIX C

CHAPTER 160A. CITIES AND TOWNS
ARTICLE 4A. EXTENSION OF CORPORATE LIMITS

§§ 160A-43, 160A-44: Repealed by Session Laws 1983, c. 636, s. 27.

Editor's Note --Session Laws 1983, c. 636, which repealed these sections, in s. 37.1, as amended by Session Laws 1983, c. 768, s. 25, provided: "The General Assembly intends by this act to repeal all acts and provisions of acts that modify the application to particular cities and towns of Parts 2 and 3 of Article 4A of Chapter 160A of the General Statutes or that exempt particular cities or towns from the application of either or both of those two Parts. Therefore, all such acts and provisions of acts, even if not specifically listed and repealed in Sections 26 through 35.4 of this act, are repealed. Neither this section nor Sections 26 through 35.4 of this act shall affect any annexation in progress on the dates of ratification of this act under any of the repealed or amended sections."

Section 38 of Session Laws 1983, c. 636 provided: "This act shall be effective with respect to all annexations where resolutions of intent are adopted on or after the date of ratification of this act, except that Sections 36 and 37 shall become effective with respect to all annexations where resolutions of intent are adopted on or after July 1, 1984, Sections 25.1 through 35.5 and Section 37.1 are effective upon ratification and Section 25 shall become effective as

provided in that section. No annexation where a resolution of intent was adopted prior to the date of ratification of this act shall be affected by this act except as provided in Section 25."

The act was ratified June 29, 1983.

§ 160A-45 Declaration of policy

It is hereby declared as a matter of State policy:

(1) That sound urban development is essential to the continued economic development of North Carolina;

(2) That municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare in areas being intensively used for residential, commercial, industrial, institutional and governmental purposes or in areas undergoing such development;

(3) That municipal boundaries should be extended in accordance with legislative standards applicable throughout the State, to include such areas and to provide the high quality of governmental services needed therein for the public health, safety and welfare;

(4) That new urban development in and around municipalities having a population of 5,000 or more persons is more scattered than in and around smaller municipalities, and that such larger municipalities have greater difficulty in expanding municipal utility systems and other service facilities to serve such scattered development, so that the legislative standards governing annexation by larger municipalities must take these facts into account if the objectives set forth in this section are to be attained;

(5) That areas annexed to municipalities in accordance with such uniform legislative standards should receive the services provided by the annexing municipality in accordance with G.S. 160A-47(3).

Statutes Do Not Give a County Authority over Provision of Sewer Services Within a City, or over Newly Annexed Areas of the city which also lie in the county. *Davidson County v. City of High Point,* 321 N.C. 252, 362 S.E.2d 553 (1987).

Use of City-owned Sewage Treatment Plant Without Prior Approval of County. --Since county had no authority to restrict or regulate city's provision of sewer service to its residents, the city could use city-owned sewage treatment plant located outside the city but within the county, which was upgraded pursuant to the county's special use permit, with a condition attached to the permit requiring the

county's prior approval of service to county citizens, to meet its statutory mandate to provide sewer service to residents in newly annexed areas without seeking the county's prior approval, even though the facility was located in the county. *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987).

Where One Municipality Institutes Valid Annexation Proceedings First, That Municipality Should Be Given Priority under the prior jurisdiction rule, and subsequent annexation proceedings, of whatever nature, are of no force and effect. *City of Burlington v. Town of Elon College*, 310 N.C. 723, 314 S.E.2d 534 (1984).

Preference of Landowners Is of No Consequence. --For purposes of the prior jurisdiction rule, annexation proceedings, regardless of their nature, are "equivalent proceedings," and it is of no consequence which town or city the landowners prefer. In fact, it appears to be the very essence of the involuntary annexation procedures that the affected landowners have no choice, as long as the annexing body complies with the applicable statutes. *City of Burlington v. Town of Elon College*, 310 N.C. 723, 314 S.E.2d 534 (1984).

Discovery. --Though discovery in annexation proceedings is not altogether forbidden, its scope is necessarily limited by the nature of the proceeding. *Campbell v. City of Greensboro,* 70 N.C. App. 252, 319 S.E.2d 323, *cert. denied and appeal dismissed*, 312 N.C. 492, 322 S.E.2d 553 (1984).

Reports' Statement of Policy Objectives Held Sufficient. --A statement in an annexation plan report that the annexation was designed to promote sound urban development and assure adequate provision of government services was a sufficient statement of the policy objectives to be met by the annexation to comply with this section. *Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E.2d 265 (1980), rehearing denied, 301 N.C. 728, 274 S.E.2d 230 (1981).

Judicial Review. --The General Assembly has provided for limited judicial review of annexation ordinances. Section 160A-50 provides that a property owner in the annexed area may seek judicial review of the ordinance. Upon such review, the superior court may consider only whether (1) the statutory procedure was not followed, or (2) the provisions of § 160A-47 were not met, or (3) the provisions of § 160A-48 have not been met. Additionally, petitioner must carry the burden of showing both noncompliance with statutory requirements and procedure and material injury flowing from such noncompliance. *McKenzie v. City of High Point*, 61 N.C. App. 393, 301 S.E.2d 129, *cert. denied*, 308 N.C. 544, 302 S.E.2d 885 (1983).

Applied in *In re Annexation Ordinance*, 44 N.C. App. 274, 261 S.E.2d 39 (1979); *Food Town Stores, Inc. v. City of Salisbury,* 300 N.C. 21, 265 S.E.2d 123 (1980); *In re Annexation Ordinance No. 1219,* 62 N.C. App. 588, 303 S.E.2d 380 (1983); *Thrash v. City of Asheville,* 327 N.C. 251, 393 S.E.2d 842 (1990).

Quoted in *In re Annexation Ordinances Nos. 866-870,* 253 N.C. 637, 117 S.E.2d 795 (1961).

Stated in *In re Annexation Ordinance, 300 N.C. 337,* 266 S.E.2d 661 (1980); *Texfi Indus., Inc. v. City of Fayetteville,* 301 N.C. 1, 269 S.E.2d 142 (1980).

Cited in *Kritzer v. Town of Southern Pines,* 33 N.C. App. 152, 234 S.E.2d 648 (1977); *In re Annexation Ordinance No. 300-X,* 304 N.C. 549, 284 S.E.2d 470 (1981); *In re Annexation Ordinance 301-X,* 304 N.C. 565, 284 S.E.2d 475 (1981); *Ricks v. Town of Selma,* 99 N.C. App. 82, 392 S.E.2d 437 (1990).

§ 160A-46. Authority to annex

The governing board of any municipality having a population of 5,000 or more persons according to the last federal decennial census may extend the corporate limits of such municipality under the procedure set forth in this Part.

Legal Periodicals. --For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," *see* 63 N.C.L. Rev. 1260 (1985).

CASE NOTES:

This Section Is Constitutional. *In re Annexation Ordinances Nos. 866-870,* 253 N.C. 637, 117 S.E.2d 795 (1961).

Right to Use New Annexation Method as Only Discretion Delegated to Municipalities. --By the enactment of Part 3 of this Article, the General Assembly did not

delegate to the municipalities of the State having a population of 5,000 or more any discretion with respect to the provisions of the law. The guiding standards and requirements of the act are set out in great detail. The only discretion given to the governing boards of such municipalities is the permissive or discretionary right to use this new method of annexation, provided such boards conform to the procedure and meet the requirements set out in the act as a condition precedent to the right to annex. *In re Annexation Ordinances Nos. 866-870,* 253 N.C. 637, 117 S.E.2d 795 (1961).

A City Has Statutory Authority to Annex Areas Both Contiguous and Non-contiguous to its primary corporate limits. It must stand ready to provide sewer service (among other services) to newly annexed areas on substantially the same basis and in the same manner in which these services are provided to the rest of the city. *Davidson County v. City of High Point,* 321 N.C. 252, 362 S.E.2d 553 (1987).

Use of City-owned Sewage Treatment Plant Without Prior Approval of County. --Since county had no authority to restrict or regulate city's provision of sewer service to its residents, the city could use city-owned sewage treatment plant located outside the city but within the county, which was upgraded pursuant to the county's special use permit, with a condition attached to the permit requiring the county's prior approval of service to county citizens, to meet its statutory mandate to provide sewer service to residents in newly annexed areas without seeking the county's prior approval, even though the facility was located in the county. *Davidson*

County v. City of High Point, 321 N.C. 252, 362 S.E.2d 553 (1987).

Cited in *McKenzie v. City of High Point,* 61 N.C. App. 393, 301 S.E.2d 129 (1983); *In re City of Durham Annexation Ordinance Numbered 5991 for Area A,* 69 N.C. App. 77, 316 S.E.2d 649 (1984).

§ 160A-47. Prerequisites to annexation; ability to serve; report and plans

A municipality exercising authority under this Part shall make plans for the extension of services to the area proposed to be annexed and shall, prior to the public hearing provided for in G.S. 160A-49, prepare a report setting forth such plans to provide services to such area. The report shall include:

(1) A map or maps of the municipality and adjacent territory to show the following information:

a. The present and proposed boundaries of the municipality.

b. The present major trunk water mains and sewer interceptors and outfalls, and the proposed extensions of such mains and outfalls as required in subdivision (3) of this section. The water and sewer map must bear the

seal of a registered professional engineer.

c. The general land use pattern in the area to be annexed.

(2) A statement showing that the area to be annexed meets the requirements of G.S. 160A-48.

(3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:

a. Provide for extending police protection, fire protection, solid waste collection and street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. A contract with a rural fire department to provide fire protection shall be an acceptable method of providing fire protection. If a water distribution system is not available in the area to be annexed, the plans must call for reasonably effective fire

protection services until such time as waterlines are made available in such area under existing municipal policies for the extension of waterlines. A contract with a private firm to provide solid waste collection services shall be an acceptable method of providing solid waste collection services.

b. Provide for extension of major trunk water mains and sewer outfall lines into the area to be annexed so that when such lines are constructed, property owners in the area to be annexed will be able to secure public water and sewer service, according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions. If requested by the owner of an occupied dwelling unit or an operating commercial or industrial property in writing on a form provided by the municipality, which form acknowledges that such extension or extensions will be made according to the current financial policies of the municipality for making such extensions, and if such form is received by the city clerk no later than five days after the public hearing, provide for extension of water and

sewer lines to the property or to a point on a public street or road right-of-way adjacent to the property according to the financial policies in effect in such municipality for extending water and sewer lines. If any such requests are timely made, the municipality shall at the time of adoption of the annexation ordinance amend its report and plan for services to reflect and accommodate such requests, if an amendment is necessary. In areas where the municipality is required to extend sewer service according to its policies, but the installation of sewer is not economically feasible due to the unique topography of the area, the municipality shall provide septic system maintenance and repair service until such time as sewer service is provided to properties similarly situated.

c. If extension of major trunk water mains, sewer outfall lines, sewer lines and water lines is necessary, set forth a proposed timetable for construction of such mains, outfalls and lines as soon as possible following the effective date of annexation. In any event, the plans shall call for construction to be

completed within two years of the effective date of annexation.

d. Set forth the method under which the municipality plans to finance extension of services into the area to be annexed.

(4) A statement of the impact of the annexation on any rural fire department providing service in the area to be annexed and a statement of the impact of the annexation on fire protection and fire insurance rates in the area to be annexed, if the area where service is provided is in an insurance district designated under G.S. 153A-233, a rural fire protection district under Article 3A of Chapter 69 of the General Statutes, or a fire service district under Article 16 of Chapter 153A of the General Statutes. The rural fire department shall make available to the city not later than 30 days following a written request from the city all information in its possession or control, including but not limited to operational, financial and budgetary information, necessary for preparation of a statement of impact. The rural fire department forfeits its rights under G.S. 160A-49.1 and G.S. 160A-49.2 if it fails to make a good faith response within 45 days following receipt of the written request for information from the city, provided that the city's written request so states by specific reference to this section.

(5) A statement showing how the proposed annexation will affect the city's finances and services, including city revenue change estimates. This statement shall be delivered to the clerk of the board of county commissioners at least 30 days before the date of the public informational meeting on any annexation under this Part.

Local Modification. --Franklin: 1969, c. 1232.

Editor's Note. --Session Laws 1983, c. 636, which amended this section, in s. 37.1, as amended by Session Laws 1983, c. 768, s. 25, provided: "The General Assembly intends by this act to repeal all acts and provisions of acts that modify the application to particular cities and towns of Parts 2 and 3 of Article 4A of Chapter 160A of the General Statutes or that exempt particular cities or towns from the application of either or both of those two Parts. Therefore, all such acts and provisions of acts, even if not specifically listed and repealed in Sections 26 through 35.4 of this act, are repealed. Neither this section nor Sections 26 through 35.4 of this act shall affect any annexation in progress on the dates of ratification of this act under any of the repealed or amended sections."

Section 38 of Session Laws 1983, c. 636 provided: "This act shall be effective with respect to all annexations where resolutions of intent are adopted on or after the date of ratification of this act, except that Sections 36 and 37 shall become effective with respect to all annexations where resolutions of intent are adopted on or after July 1, 1984,

Sections 25.1 through 35.5 and Section 37.1 are effective upon ratification and Section 25 shall become effective as provided in that section. No annexation where a resolution of intent was adopted prior to the date of ratification of this act shall be affected by this act except as provided in Section 25."

The act was ratified June 29, 1983.

Session Laws 1991, c. 25, s. 2, effective April 1, 1991, and applicable to resolutions of intent adopted on or after March 1, 1992, designated the existing language as subsection (a), and added subsection (b). However, Session Laws 1991, c. 761, s. 31, effective July 16, 1991, provided: "G.S. 160A-47(b), as enacted by Section 1 of Chapter 25 of the 1991 Session Laws, is recodified as G.S. 160A-47.1, with a catch line to read: "Limitation on change in financial participation prior to annexation.' G.S. 160A-47(a) is redesignated as G.S. 160A-47."

Effect of Amendments. --The 1998 amendment, effective November 1, 1998, and applicable to annexations for which the resolution of intent is adopted on or after that date, in the second sentence of subdivision (3)b. substituted "no later than five days after the public hearing" for "not less than 30 days before adoption of the annexation ordinance," at the end of the third sentence added "if an amendment is necessary," and added the fourth sentence; and added subdivision (5).

Legal Periodicals. --For survey of 1981 administrative law, *see* 60 N.C.L. Rev. 1165 (1982).

Chapter 160A. Cities and Towns
Article 4a. Extension of Corporate Limits

For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," *see* 63 N.C.L. Rev. 1260 (1985).

CASE NOTES

I. In General.
II. Maps.
III. Plans for Extending Services.

A. In General.
B. Police and Fire Protection.
C. Street Maintenance.
D. Water and Sewer Service.

IV. Method of Financing.

I. IN GENERAL.

Purpose. --The purpose of this section is to insure that major municipal services are provided to newly annexed areas on a nondiscriminatory basis. *Wallace v. Town of Chapel Hill,* 93 N.C. App. 422, 378 S.E.2d 225 (1989).

Purpose. --The purpose of this statute is to insure that, in return for the financial burden of city taxes, annexed residents receive all major city services. *Parkwood Ass'n v. City of Durham,* 124 N.C. App. 603, 478 S.E.2d 204 (1996).

Section Required to Be Followed Only Where Annexation Achieved under Chapter 160a, Art. 4a, Part 3. --This section, dealing with the submission of plans by the

municipality for the extension of municipal services (including police and fire protection, solid waste collection, and street maintenance), and § § 160A-49.1 and 160A-49.3, dealing with contracting for fire protection and sewage services, are required to be followed by a municipality only where the annexation is to be achieved under Chapter 160A, Art. 4A, Part 3. *Piedmont Ford Truck Sales, Inc. v. City of Greensboro,* 90 N.C. App. 692, 370 S.E.2d 262 (1988), rev'd on other grounds, 324 N.C. 499, 380 S.E.2d 107 (1989).

Budgeting of Funds at Time of Trial Held Unnecessary. --Since subdivision (3) of this section requires only that the annexing city file a statement showing how it will provide and finance municipal services to the annexed area, and since there is no requirement that available services be duplicated, the City of Goldsboro, in annexing a federal air force base, was not required to have funds budgeted at the time of trial to provide municipal services to the base in the event the federal government ceased providing those services, where the plan of annexation was based upon sound estimates of anticipated expenditures and revenues. *In re Ordinance of Annexation No. 1977-4,* 296 N.C. 1, 249 S.E.2d 698 (1978).

§ 160A-47.1. Limitation on change in financial participation prior to annexation

For purposes of the extension of water and sewer services required under G.S. 160A-47, no ordinance or policy substantially diminishing the financial participation of a municipality in the construction of water or sewer facilities required under this Article may apply to an area being

annexed unless the ordinance or policy became effective at least 180 days prior to the date of adoption by the municipality of the resolution giving notice of intent to consider annexing the area under G.S. 160A-49(a).

Editor's Note. --Session Laws 1991, c. 25, s. 2, initially amended § 160A-47 by adding a subsection (b). This subsection was recodified as new § 160A-47.1 by Session Laws 1991, c. 761, s. 31, effective July 16, 1991, which provides: "G.S. 160A-47(b), as enacted by Section 1 of Chapter 25 of the 1991 Session Laws, is recodified as G.S. 160A-47.1, with a catch line to read: "Limitation on change in financial participation prior to annexation.' G.S. 160A-47(a) is redesignated as G.S. 160A-47."

Section 3 of Session Laws 1991, c. 25 makes this section effective April 1, 1991, and applicable to resolutions of intent adopted on or after March 1, 1992.

§ 160A-48. Character of area to be annexed

(a) A municipal governing board may extend the municipal corporate limits to include any area

(1) Which meets the general standards of subsection (b), and

(2) Every part of which meets the requirements of either subsection (c) or subsection (d).

(b) The total area to be annexed must meet the following standards:

> (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun, except if the entire territory of a county water and sewer district created under G.S. 162A-86(b1) is being annexed, the annexation shall also include any noncontiguous pieces of the district as long as the part of the district with the greatest land area is adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun.
>
> (2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.
>
> (3) No part of the area shall be included within the boundary of another incorporated municipality.

(c) Part or all of the area to be annexed must be developed for urban purposes at the time of approval of the report provided for in G.S. 160A-47. Area of streets and street rights-of-way shall not be used to determine total acreage under this section. An area developed for urban purposes is defined as any area

which meets any one of the following standards:

(1) Has a total resident population equal to at least two and three-tenths persons for each acre of land included within its boundaries; or

(2) Has a total resident population equal to at least one person for each acre of land included within its boundaries, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage consists of lots and tracts three acres or less in size and such that at least sixty-five percent (65%) of the total number of lots and tracts are one acre or less in size; or

(3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of

lots and tracts three acres or less in size. For purposes of this section, a lot or tract shall not be considered in use for a commercial, industrial, institutional, or governmental purpose if the lot or tract is used only temporarily, occasionally, or on an incidental or insubstantial basis in relation to the size and character of the lot or tract. For purposes of this section, acreage in use for commercial, industrial, institutional, or governmental purposes shall include acreage actually occupied by buildings or other man-made structures together with all areas that are reasonably necessary and appurtenant to such facilities for purposes of parking, storage, ingress and egress, utilities, buffering, and other ancillary services and facilities; or

(4) Is the entire area of any county water and sewer district created under G.S. 162A-86(b1), but this subdivision only applies to annexation by a municipality if that:

a. Municipality has provided in a contract with that district that

the area is developed for urban purposes; and

b. Contract provides for the municipality to operate the sewer system of that county water and sewer district;

provided that the special categorization provided by this subdivision only applies if the municipality is annexing in one proceeding the entire territory of the district not already within the corporate limits of a municipality; or

(5) Is so developed that, at the time of the approval of the annexation report, all tracts in the area to be annexed are used for commercial, industrial, governmental, or institutional purposes.

(d) In addition to areas developed for urban purposes, a governing board may include in the area to be annexed any area which does not meet the requirements of subsection (c) if such area either:

(1) Lies between the municipal boundary and an area developed for urban purposes so that the area developed for urban purposes is either

not adjacent to the municipal boundary or cannot be served by the municipality without extending services and/or water and/or sewer lines through such sparsely developed area; or

(2) Is adjacent, on at least sixty percent (60%) of its external boundary, to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes as defined in subsection (c).

The purpose of this subsection is to permit municipal governing boards to extend corporate limits to include all nearby areas developed for urban purposes and where necessary to include areas which at the time of annexation are not yet developed for urban purposes but which constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes. For purposes of this subsection, "necessary land connection" means an area that does not exceed twenty-five percent (25%) of the total area to be annexed.

(e) In fixing new municipal boundaries, a municipal governing board shall use recorded property lines and streets as boundaries. Some or all of the boundaries of a county water and sewer district may also be used when the entire district not already within the corporate limits of a municipality is being annexed.

(f) The area of an abolished water and sewer district shall be considered to be a water and sewer district for the purpose of this section even after its abolition under G.S. 162A-87.2(b).

Local Modification. --City of Archdale: 2001-39 (for ordinances adopted before December 31, 2002); city of Durham: 1987, c. 606; 1993, c. 342, s. 1.

Editor's Note. --Session Laws 1983, c. 636, which amended this section, in s. 37.1, amended by Session Laws 1983, c. 768, s. 25, provided: "The General Assembly intends by this act to repeal all acts and provisions of acts that modify the application to particular cities and towns of Parts 2 and 3 of Article 4A of Chapter 160A of the General Statutes or that exempt particular cities or towns from the application of either or both of those two Parts. Therefore, all such acts and provisions of acts, even if not specifically listed and repealed in Sections 26 through 35.4 of this act, are repealed. Neither this section nor Sections 26 through 35.4 of this act shall affect any annexation in progress on the dates of ratification of this act under any of the repealed or amended sections."

Section 38 of Session Laws 1983, c. 636 provided: "This act shall be effective with respect to all annexations where resolutions of intent are adopted on or after the date of ratification of this act, except that Sections 36 and 37 shall become effective with respect to all annexations where resolutions of intent are adopted on or after July 1, 1984,

Sections 25.1 through 35.5 and Section 37.1 are effective upon ratification and Section 25 shall become effective as provided in that section. No annexation where a resolution of intent was adopted prior to the date of ratification of this act shall be affected by this act except as provided in Section 25."

The act was ratified June 29, 1983.

Legal Periodicals. --For survey of 1978 administrative law, *see* 57 N.C.L. Rev. 831 (1979).

For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," *see* 63 N.C.L. Rev. 1260 (1985).

See Legislative Survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

Constitutionality. - *See In re City of Durham Annexation Ordinance No. 5791,* 66 N.C. App. 472, 311 S.E.2d 898 (1984).

The Annexation Statutes Are Not Taxation Statutes, nor are they retrospective taxation statutes. *Little Red School House, Ltd. v. City of Greensboro,* 71 N.C. App. 332, 322 S.E.2d 195 (1984), *cert. denied and appeal dismissed*, 313 N.C. 514, 329 S.E.2d 392 (1985).

Question Whether Area Is Ripe for Annexation Should Be Addressed under Statutory Criteria set up in this section. *Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E.2d 265 (1980), *rehearing denied*, 301 N.C. 728, 274 S.E.2d 230 (1981).

The Entire Area to Be Annexed must Meet the Requirements of Subsection (b) of this section. *In re Annexation Ordinance,* 300 N.C. 337, 266 S.E.2d 661 (1980).

Cities with 5,000 or more people may annex an outlying urban area pursuant to subsection (c) of this section and the intervening undeveloped lands pursuant to subsection (d) so long as the entire area meets the requirements of subsection (b). *In re Annexation Ordinance*, 300 N.C. 337, 266 S.E.2d 661 (1980).

This Section and § 160a-36 Compared. --The provisions of subsections (b), (c) and (e) of this section are virtually identical to their counterparts in subsections (b), (c) and (d) of § 160A-36. *Matheson v. City of Asheville*, 102 N.C. App. 156, 402 S.E.2d 140 (1991).

This Section Describes the Character of Areas Which May Properly Be Annexed. Generally, Such an Area (i) cannot be included within the boundary of another incorporated municipality, (ii) must be adjacent to the existing boundaries of the annexing municipality, (iii) must be developed for urban purposes or must connect an outlying area developed for urban purposes with the municipality and (iv) wherever practical should use topographic features as

boundaries. *Matheson v. City of Asheville*, 102 N.C. App. 156, 402 S.E.2d 140 (1991).

§ 160A-49. Procedure for annexation

(a) Notice of Intent. -- Any municipal governing board desiring to annex territory under the provisions of this Part shall first pass a resolution stating the intent of the municipality to consider annexation. Such resolution shall describe the boundaries of the area under consideration, fix a date for a public informational meeting, and fix a date for a public hearing on the question of annexation. The date for the public informational meeting shall be not less than 45 days and not more than 55 days following passage of the resolution. The date for the public hearing to be not less than 60 days and not more than 90 days following passage of the resolution.

(b) Notice of Public Hearing. -- The notice of public hearing shall:

(1) Fix the date, hour and place of the public informational meeting and the date, hour, and place of the public hearing.

(2) Describe clearly the boundaries of the area under consideration, and include a legible map of the area.

(3) State that the report required in G.S. 160A-47 will be available at the office of the municipal clerk at least 30 days prior to the date of the public informational meeting.

(4) Include a notice of a property owner's rights to request water and sewer service in accordance with G.S. 160A-47.

(5) Include an explanation of a property owner's rights pursuant to subsections (f1) and (f2) of this section.

Such notice shall be given by publication once a week for at least two successive weeks prior to the date of the informational meeting in a newspaper having general circulation in the municipality and, in addition thereto, if the area to be annexed lies in a county containing less than fifty percent (50%) of the land area of the municipality, in a newspaper having general circulation in the area of proposed annexation. The period from the date of the first publication to the date of the last publication, both dates inclusive, shall

be not less than eight days including Sundays, and the date of the last publication shall be not more than seven days preceding the date of public informational meeting. If there be no such newspaper, the municipality shall post the notice in at least five public places within the municipality and at least five public places in the area to be annexed for 30 days prior to the date of public informational meeting. In addition, notice shall be mailed at least four weeks prior to date of the informational meeting by first class mail, postage prepaid to the owners as shown by the tax records of the county of all freehold interests in real property located within the area to be annexed. The person or persons mailing such notices shall certify to the governing board that fact, and such certificate shall become a part of the record of the annexation proceeding and shall be deemed conclusive in the absence of fraud. If the notice is returned to the city by the postal service by the tenth day before the informational meeting, a copy of the notice shall be sent by certified mail, return receipt requested, at least seven days before the informational meeting. Failure to comply with the mailing requirements of this subsection shall not invalidate the annexation unless it is shown that the requirements were not substantially complied with. If the governing board by resolution finds that the tax records are not adequate to identify the owners of

some or all of the parcels of real property within the area it may in lieu of the mail procedure as to those parcels where the owners could not be so identified, post the notice at least 30 days prior to the date of public informational meeting on all buildings on such parcels, and in at least five other places within the area to be annexed. In any case where notices are placed on property, the person placing the notices shall certify that fact to the governing board.

(c) Action Prior to Informational Meeting. -- At least 30 days before the date of the public informational meeting, the governing board shall approve the report provided for in G.S. 160A-47, and shall make it available to the public at the office of the municipal clerk. In addition, the municipality may prepare a summary of the full report for public distribution. In addition, the city shall post in the office of the city clerk, at least 30 days before the public informational meeting, a legible map of the area to be annexed and a list of persons holding freehold interests in property in the area to be annexed that it has identified.

(c1) Public Informational Meeting. -- At the public informational meeting a representative of the municipality shall first make an explanation of the report required in G.S.

160A-47. Following such explanation, all persons resident or owning property in the territory described in the notice of public hearing, and all residents of the municipality, shall be given the opportunity to ask questions and receive answers regarding the proposed annexation.

(d) Public Hearing. -- At the public hearing a representative of the municipality shall first make an explanation of the report required in G.S. 160A-47. Following such explanation, all persons resident or owning property in the territory described in the notice of public hearing, and all residents of the municipality, shall be given an opportunity to be heard.

(e) Passage of the Annexation Ordinance. -- The municipal governing board shall take into consideration facts presented at the public hearing and shall have authority to amend the report required by G.S. 160A-47 to make changes in the plans for serving the area proposed to be annexed so long as such changes meet the requirements of G.S. 160A-47, provided that if the annexation report is amended to show additional subsections of G.S. 160A-48(c) or (d) under which the annexation qualifies that were not listed in the original report, the city must hold an additional public hearing on the annexation not less than 30 nor more than 90 days after the

date the report is amended, and notice of such new hearing shall be given at the first public hearing. At any regular or special meeting held no sooner than the tenth day following the public hearing and not later than 90 days following such public hearing, the governing board shall have authority to adopt an ordinance extending the corporate limits of the municipality to include all, or such part, of the area described in the notice of public hearing which meets the requirements of G.S. 160A-48 and which the governing board has concluded should be annexed. The ordinance shall:

> (1) Contain specific findings showing that the area to be annexed meets the requirements of G.S. 160A-48. The external boundaries of the area to be annexed shall be described by metes and bounds. In showing the application of G.S. 160A-48(c) and (d) to the area, the governing board may refer to boundaries set forth on a map of the area and incorporate same by reference as a part of the ordinance.
>
> (2) A statement of the intent of the municipality to provide services to the area being annexed as set forth in the report required by G.S. 160A-47.

(3) A specific finding that on the effective date of annexation the municipality will have funds appropriated in sufficient amount to finance construction of any major trunk water mains and sewer outfalls and such water and sewer lines as required in G.S. 160A-47(3)b found necessary in the report required by G.S. 160A-47 to extend the basic water and/or sewer system of the municipality into the area to be annexed, or that on the effective date of annexation the municipality will have authority to issue bonds in an amount sufficient to finance such construction. If authority to issue such bonds must be secured from the electorate of the municipality prior to the effective date of annexation, then the effective date of annexation shall be no earlier than the day following the statement of the successful result of the bond election.

(4) Fix the effective date for annexation. The effective date of annexation may be fixed for any date not less than 70 days nor more than 400 days from the date of passage of the ordinance.

(f) Effect of Annexation Ordinance. -- Except as provided in subsection (f1) of this section, from and after the effective date of the annexation ordinance, the territory and its citizens and property shall be subject to all debts, laws, ordinances and regulations in force in such municipality and shall be entitled to the same privileges and benefits as other parts of such municipality. Real and personal property in the newly annexed territory on the January 1 immediately preceding the beginning of the fiscal year in which the annexation becomes effective is subject to municipal taxes as provided in G.S. 160A-58.10. Provided that annexed property which is a part of a sanitary district, which has installed water and sewer lines, paid for by the residents of said district, shall not be subject to that part of the municipal taxes levied for debt service for the first five years after the effective date of annexation. If this proviso should be declared by a court of competent jurisdiction to be in violation of any provision of the federal or State Constitution, the same shall not affect the remaining provisions of this Part. If the effective date of annexation falls between June 1 and June 30, and the effective date of the privilege license tax ordinance of the annexing municipality is June 1, then businesses in the area to be annexed shall be liable for taxes imposed in such ordinances from and after the effective date of annexation.

(f1) Property Subject to Present-Use Value Appraisal. -- If an area described in an annexation ordinance includes agricultural land, horticultural land, or forest land that on the effective date of annexation is:

> (1) Land that is being taxed at present-use value pursuant to G.S. 105-277.4; or
>
> (2) Land that:
>
> a. Was on the date of the resolution of intent for annexation being used for actual production and is eligible for present-use value taxation under G.S. 105-277.4, but the land has not been in use for actual production for the required time under G.S. 105-277.3; and
>
> b. The assessor for the county where the land subject to annexation is located has certified to the city that the land meets the requirements of this subdivision

the annexation becomes effective as to that property pursuant to subsection (f2) of this section.

(f2) Effective Date of Annexation for Certain Property.-Annexation of property subject to annexation under subsection (f1) of this section shall become effective:

> (1) Upon the effective date of the annexation ordinance, the property is considered part of the city only (i) for the purpose of establishing city boundaries for additional annexations pursuant to this Article and (ii) for the exercise of city authority pursuant to Article 19 of this Chapter.
>
> (2) For all other purposes, the annexation becomes effective as to each tract of such property or part thereof on the last day of the month in which that tract or part thereof becomes ineligible for classification pursuant to G.S. 105-227.4 or no longer meets the requirements of subdivision (f1)(2) of this section. Until annexation of a tract or a part of a tract becomes effective pursuant to this subdivision, the tract or part of a tract is not subject to taxation by the city under Article 12 of Chapter 105 of the General Statutes nor is the tract or part of a tract entitled to services provided by the city.

(g) Simultaneous Annexation Proceedings. -- If a municipality is considering the annexation of two or more areas which are all adjacent to the municipal boundary but are not adjacent to one another, it may undertake simultaneous proceedings under authority of this Part for the annexation of such areas.

(h) Remedies for Failure to Provide Services. -- If, not earlier than one year from the effective date of annexation, and not later than 15 months from the effective date of annexation, any person owning property in the annexed territory shall believe that the municipality has not followed through on its service plans adopted under the provisions of G.S. 160A-47(3) and 160A-49(e), for any required service other than water and sewer services such person may apply for a writ of mandamus under the provisions of Article 40, Chapter 1 of the General Statutes. Relief may be granted by the judge of superior court

> (1) If the municipality has not provided the services set forth in its plan submitted under the provisions of G.S. 160A-47(3)a on substantially the same basis and in the same manner as such services were provided within the rest of the municipality prior to the effective date of annexation, and

> (2) If at the time the writ is sought such services set forth in the plan submitted under the provisions of G.S. 160A-47(3)a are still being provided on substantially the same basis and in the same manner as on the date of annexation of the municipality.

If, not earlier than 24 months from the effective date of the annexation, and not later than 27 months from the effective date of the annexation, any person owning property in the annexed area can show that the plans submitted under the provisions of G.S. 160A-47(3)c require the construction of major trunk water mains and sewer outfall lines and if construction has not been completed within two years of the effective date of the annexation, relief may also be granted by the superior court by an order to the municipality to complete such lines and outfalls within a certain time. Similar relief may be granted by the superior court to any owner of property who made a timely request for a water or sewer line, or both, pursuant to G.S. 160A-47(3)b and such lines have not been completed within two years from the effective date of annexation in accordance with applicable city policies and through no fault of the owner, if such owner petitions for such relief not earlier than 24 months following the effective date of annexation and not later than 27 months following the effective date of annexation.

If a writ is issued, costs in the action, including a reasonable attorney's fee for such aggrieved person, shall be charged to the municipality.

(i) No resolution of intent may be adopted under subsection (a) of this section unless the city council (or planning agency created or designated under either G.S. 160A-361 or the charter) has, by resolution adopted at least one year prior to adoption of the resolution of intent, identified the area as being under consideration for annexation and included a statement in the resolution notifying persons subject to the annexation of their rights under subsections (f1) and (f2) of this section; provided, adoption of such resolution of consideration shall not confer prior jurisdiction over the area as to any other city. The area described under the resolution of intent may comprise a smaller area than that identified by the resolution of consideration. The resolution of consideration may have a metes and bounds description or a map and shall remain effective for two years after adoption, and shall be filed with the city clerk. A new resolution of consideration adopted before expiration of the two-year period for a previously adopted resolution covering the same area shall relate back to the date of the previous resolution.

(j) Subsection (i) of this section shall not apply to the annexation of any area if the resolution of intent describing the area and the ordinance annexing the area both provide that the effective date of the annexation shall be at least

one year from the date of passage of the annexation ordinance.

(k) If a valid request for extension of a water or sewer line has been made under G.S. 160A-47(3)b, and the extension is not complete at the end of two years after the effective date of the annexation ordinance, the owner of the property may petition the Local Government Commission for abatement of taxes to be paid to the city which have not been levied as of the expiration date of the two-year period, if such petition is filed not more than 60 days after the expiration of the two-year period. If the Local Government Commission finds that the extension to the property was not complete by the end of the two-year period, it shall enter an order directing the city not to levy any further ad valorem taxes on the property until the fiscal year commencing after completion of the extension. In addition, if the Local Government Commission found that the extension to the property was not completed by the end of the two-year period, and if it finds that for any fiscal year during the period beginning with the first day of the fiscal year in which the annexation ordinance became effective and ending the last day of the fiscal year in which the two-year period expired, the city made an appropriation for construction, operation or maintenance of a water or sewer system (other than payments the city made as

a customer of the system) from the fund or funds for which ad valorem taxes are levied, then the Local Government Commission shall order the city to release or refund an amount of the petitioner's property taxes for that year in question in proportion to the percentage of appropriations in the fund made for water and sewer services. By way of illustration, if a net amount of one hundred thousand dollars ($ 100,000) was appropriated for water or sewer construction, operation or maintenance from a fund which had total expenditures of ten million dollars ($ 10,000,000) and the petitioner's tax levy was one thousand dollars ($ 1,000), the amount of release or refund shall be ten dollars ($ 10.00).

(*l*) If a city fails to deliver police protection, fire protection, solid waste or street maintenance services as provided for in G.S. 160A-47(3)a. within 60 days after the effective date of the annexation, the owner of the property may petition the Local Government Commission for abatement of taxes to be paid to the city for taxes that have been levied as of the end of the 60-day period, if the petition is filed not more than 90 days after the expiration of the 60-day period. If the Local Government Commission finds that services were not extended by the end of the 60-day period, it shall enter an order directing the city not to levy any further ad valorem taxes on the

property until the fiscal year commencing after extension of the municipal services.

Local Modification. --City of Durham: 1993, c. 342, s. 1; city of Raleigh: 1977, c. 351; city of Reidsville: 1997-343; town of Matthews: 2000-100, s. 4.1.

Cross References. --As to effective date of certain annexation ordinances adopted from January 1, 1987, to August 3, 1987, *see* § 160A-58.9.

Editor's Note. --Session Laws 1983, c. 636, which amended this section, in s. 37.1, as amended by Session Laws 1983, c. 768, s. 25, provided: "The General Assembly intends by this act to repeal all acts and provisions of acts that modify the application to particular cities and towns of Parts 2 and 3 of Article 4A of Chapter 160A of the General Statutes or that exempt particular cities or towns from the application of either or both of those two Parts. Therefore, all such acts and provisions of acts, even if not specifically listed and repealed in Sections 26 through 35.4 of this act, are repealed. Neither this section nor Sections 26 through 35.4 of this act shall affect any annexation in progress on the dates of ratification of this act under any of the repealed or amended sections."

Section 38 of Session Laws 1983, c. 636 provided: "This act shall be effective with respect to all annexations where resolutions of intent are adopted on or after the date of ratification of this act, except that Sections 36 and 37 shall become effective with respect to all annexations where resolutions of intent are adopted on or after July 1, 1984,

Sections 25.1 through 35.5 and Section 37.1 are effective upon ratification and Section 25 shall become effective as provided in that section. No annexation where a resolution of intent was adopted prior to the date of ratification of this act shall be affected by this act except as provided in Section 25."

The act was ratified June 29, 1983.

Article 40, Chapter 1, referred to in the first sentence of subsection (h), was repealed by Session Laws 1967, c. 954, s. 4.

Legal Periodicals. --For survey of 1977 law on property, *see 56 N.C.L. Rev. 1111 (1978).*

For survey of 1982 law on administrative law, *see 61 N.C.L. Rev. 961 (1983).*

For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," *see* 63 N.C.L. Rev. 1260 (1985).

See Legislative Survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

The Annexation Statutes Are Not Taxation Statutes, nor are they retrospective taxation statutes. *Little Red School House, Ltd. v. City of Greensboro,* 71 N.C. App. 332, 322 S.E.2d 195 (1984), *cert. denied and appeal dismissed*, 313 N.C. 514, 329 S.E.2d 392 (1985).

§ 160A-49.1. Contract with rural fire department

(a) If the area to be annexed described in a resolution of intent passed under G.S. 160A-49(a) includes an area in an insurance district defined under G.S. 153A-233, a rural fire protection district under Article 3A of Chapter 69 of the General Statutes, or a fire service district under Article 16 of Chapter 153A of the General Statutes, and a rural fire department was on the date of adoption of the resolution of intent providing fire protection in the area to be annexed, then the city (if the rural fire department makes a written request for a good faith offer, and the request is signed by the chief officer of the fire department and delivered to the city clerk no later than 15 days before the public hearing) is required to make a good faith effort to negotiate a five-year contract with the rural fire department to provide fire protection in the area to be annexed.

(b) If the area is a rural fire protection district or a fire service district, then an offer to pay annually for the term of the contract the amount of money that the tax rate in the district in effect on the date of adoption of the resolution of intent would generate based on property values on January 1 of each year in the area to be annexed which is in such a

district is deemed to be a good faith offer of consideration for the contract.

(c) If the area is an insurance district but not a rural fire protection district or fire service district, then an offer to pay annually over the term of the contract the amount of money which is determined to be the equivalent of the amount which would be generated by multiplying the fraction of the city's general fund budget in that current fiscal year which is proposed to be expended for fire protection times the tax rate for the city in the current year, and multiplying that result by the property valuation in the area to be annexed which is served by the rural fire department is deemed to be a good faith offer of consideration for the contract; Provided that the payment shall not exceed the equivalent of fifteen cents (15 cent(s)) on one hundred dollars ($ 100.00) valuation of annexed property in the district according to county valuations for the current fiscal year.

(d) Any offer by a city to a rural fire department which would compensate the rural fire department for revenue loss directly attributable to the annexation by paying such amount annually for five years, is deemed to be a good faith offer of consideration for the contract.

(e) Under subsections (b), (c), or (d) of this section, if the good faith offer is for first responder service, an offer of one-half the calculated amount under those subsections is deemed to be a good faith offer.

(f) This section does not obligate the city or rural fire department to enter into any contract.

(g) The rural fire department may, if it feels that no good faith offer has been made, appeal to the Local Government Commission within 30 days following the passage of an annexation ordinance. The rural fire department may apply to the Local Government Commission for an order staying the operation of the annexation ordinance pending the outcome of the review. The Commission may grant or deny the stay in its discretion upon such terms as it deems proper, and it may permit annexation of any part of the area described in the ordinance concerning which no question for review has been raised, provided that no other appeal under G.S. 160A-50 is pending.

(h) The Local Government Commission may affirm the ordinance, or if the Local Government Commission finds that no good faith offer has been made, it shall remand the ordinance to the municipal governing board for further proceedings, and the ordinance

shall then not become effective unless the Local Government Commission finds that a good faith offer has been made.

(i) Any party to the review under subsection

(h) may obtain judicial review in accordance with Chapter 150B of the General Statutes.

Cross References. --As to effective date of annexation ordinances adopted under Article 4A of Chapter 160A, *see* § 160A-58.9A.

Editor's Note. --Session Laws 1983, c. 636, which amended this section, in s. 37.1, as amended by Session Laws 1983, c. 768, s. 25, provided: "The General Assembly intends by this act to repeal all acts and provisions of acts that modify the application to particular cities and towns of Parts 2 and 3 of Article 4A of Chapter 160A of the General Statutes or that exempt particular cities or towns from the application of either or both of those two Parts. Therefore, all such acts and provisions of acts, even if not specifically listed and repealed in Sections 26 through 35.4 of this act, are repealed. Neither this section nor Sections 26 through 35.4 of this act shall affect any annexation in progress on the dates of ratification of this act under any of the repealed or amended sections."

Section 38 of Session Laws 1983, c. 636 provided: "This act shall be effective with respect to all annexations where resolutions of intent are adopted on or after the date of ratification of this act, except that Sections 36 and 37 shall

become effective with respect to all annexations where resolutions of intent are adopted on or after July 1, 1984, Sections 25.1 through 35.5 and Section 37.1 are effective upon ratification and Section 25 shall become effective as provided in that section. No annexation where a resolution of intent was adopted prior to the date of ratification of this act shall be affected by this act except as provided in Section 25."

The act was ratified June 29, 1983.

CASE NOTES

Section Required to Be Followed Only Where Annexation Achieved under Chapter 160a, Art. 4a, Part 3. --Section 160A-47, dealing with the submission of plans by the municipality for the extension of municipal services (including police and fire protection, solid waste collection, and street maintenance), this section and § 160A-49.3, dealing with contracting for fire protection and sewage services, are required to be followed by a municipality only where the annexation is to be achieved under Chapter 160A, Art. 4A, Part 3. *Piedmont Ford Truck Sales, Inc. v. City of Greensboro,* 90 N.C. App. 692, 370 S.E.2d 262 (1988), *rev'd on other grounds*, 324 N.C. 499, 380 S.E.2d 107 (1989).

Local Act Requiring City to Extend Municipal Services, including services relating to health and sanitation, in a manner not authorized except when annexation is accomplished under general law was in contravention of N.C. Const., Art. II, § 24(a), and therefore void. *Piedmont Ford Truck Sales, Inc. v. City of Greensboro,* 90 N.C. App. 692,

370 S.E.2d 262 (1988), *rev'd on other grounds*, 324 N.C. 499, 380 S.E.2d 107 (1989).

Cited in *Piedmont Ford Truck Sale, Inc. v. City of Greensboro,* 324 N.C. 499, 380 S.E.2d 107 (1989); *Chapel Hill Country Club, Inc. v. Town of Chapel Hill,* 97 N.C. App. 171, 388 S.E.2d 168 (1990).

§ 160A-50. Appeal

(a) Within 60 days following the passage of an annexation ordinance under authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in this Part or to meet the requirements set forth in G.S. 160A-48 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.

(b) Such petition shall explicitly state what exceptions are taken to the action of the governing board and what relief the petitioner seeks. Within 10 days after the petition is filed with the court, the person seeking review shall serve copies of the petition by registered mail, return receipt requested, upon the municipality.

(c) Within 15 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the municipality shall transmit to the reviewing court

> (1) A transcript of the portions of the municipal journal or minute book in which the procedure for annexation has been set forth and
>
> (2) A copy of the report setting forth the plans for extending services to the annexed area as required in G.S. 160A-47.

(d) If two or more petitions for review are submitted to the court, the court may consolidate all such petitions for review at a single hearing, and the municipality shall be required to submit only one set of minutes and one report as required in subsection (c).

(e) At any time before or during the review proceeding, any petitioner or petitioners may apply to the reviewing court for an order staying the operation of the annexation ordinance pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper, and it may permit annexation of any part of the

area described in the ordinance concerning which no question for review has been raised.

(f) The court shall fix the date for review of annexation proceedings under this Part, which review date shall preferably be within 30 days following the last day for receiving petitions to the end that review shall be expeditious and without unnecessary delays. The review shall be conducted by the court without a jury. The court may hear oral arguments and receive written briefs, and may take evidence intended to show either

(1) That the statutory procedure was not followed, or

(2)That the provisions of G.S. 160A-47 were not met, or

(3) That the provisions of G.S. 160A-48 have not been met.

(g) The court may affirm the action of the governing board without change, or it may

(1) Remand the ordinance to the municipal governing board for further proceedings if procedural irregularities are found to have materially prejudiced the substantive rights of any of the petitioners.

(2) Remand the ordinance to the municipal governing board for amendment of the boundaries to conform to the provisions of G.S. 160A-48 if it finds that the provisions of G.S. 160A-48 have not been met; provided, that the court cannot remand the ordinance to the municipal governing board with directions to add area to the municipality which was not included in the notice of public hearing and not provided for in plans for service.

(3) Remand the report to the municipal governing board for amendment of the plans for providing services to the end that the provisions of G.S. 160A-47 are satisfied.

(4) Declare the ordinance null and void, if the court finds that the ordinance cannot be corrected by remand as provided in subdivisions (1), (2), or (3) of this subsection.

If any municipality shall fail to take action in accordance with the court's instructions upon remand within 90 days following entry of the order embodying the court's instructions, the annexation proceeding shall be deemed null and void.

(h) Any party to the review proceedings, including the municipality, may appeal to the Court of Appeals from the final judgment of the superior court under rules of procedure applicable in other civil cases. The superior court may, with the agreement of the municipality, permit annexation to be effective with respect to any part of the area concerning which no appeal is being made and which can be incorporated into the city without regard to any part of the area concerning which an appeal is being made.

(i) If part or all of the area annexed under the terms of an annexation ordinance is the subject of an appeal to the superior court, Court of Appeals or Supreme Court on the effective date of the ordinance, then the ordinance shall be deemed amended to make the effective date with respect to such area the last day of the next full calendar month following the date of the final judgment of the superior court or appellate division, whichever is appropriate, or the date the municipal governing board completes action to make the ordinance conform to the court's instructions in the event of remand. For the purposes of this subsection, a denial of a petition for rehearing or for discretionary review shall be treated as a final judgement.

(j) If a petition for review is filed under subsection (a) of this section or an appeal is filed under G.S. 160A-49.1(g) or G.S. 160A-49.3(g), and a stay is granted, then the time periods of two years, 24 months or 27 months provided in G.S. 160A-47(3)c, 160A-49(h), or 160A-49(j) are each extended by the lesser of the length of the stay or one year for that annexation.

(k) The provisions of subsection (i) of this section shall apply to any judicial review authorized in whole or in part by G.S. 160A-49.1(i) or G.S. 160A-49.3(g).

(*l*) In any proceeding related to an annexation ordinance appeal under this section, a city shall not state a claim for lost property tax revenue caused by the appeal. Nothing in this Article shall be construed to mean that as a result of an appeal a municipality may assert a claim for property tax revenue lost during the pendency of the appeal.

(m) Any settlement reached by all parties in an appeal under this section may be presented to the superior court in the county in which the municipality is located. If the superior court, in its discretion, approves the settlement, it shall be binding on all parties without the need for approval by the General Assembly.

Cross References. --As to effective date of annexation ordinances adopted under Article 4A of Chapter 160A, *see* § 160A-58.9A.

Editor's Note. --Session Laws 1983, c. 636, which amended this section, in s. 37.1, as amended by Session Laws 1983, c. 768, s. 25, provided: "The General Assembly intends by this act to repeal all acts and provisions of acts that modify the application to particular cities and towns of Parts 2 and 3 of Article 4A of Chapter 160A of the General Statutes or that exempt particular cities or towns from the application of either or both of those two Parts. Therefore, all such acts and provisions of acts, even if not specifically listed and repealed in Sections 26 through 35.4 of this act, are repealed. Neither this section nor Sections 26 through 35.4 of this act shall affect any annexation in progress on the dates of ratification of this act under any of the repealed or amended sections."

Section 38 of Session Laws 1983, c. 636 provided: "This act shall be effective with respect to all annexations where resolutions of intent are adopted on or after the date of ratification of this act, except that Sections 36 and 37 shall become effective with respect to all annexations where resolutions of intent are adopted on or after July 1, 1984, Sections 25.1 through 35.5 and Section 37.1 are effective upon ratification and Section 25 shall become effective as provided in that section. No annexation where a resolution of intent was adopted prior to the date of ratification of this act shall be affected by this act except as provided in Section 25."

Chapter 160A. Cities and Towns
Article 4a. Extension of Corporate Limits

§ 160A-51. Annexation recorded

Whenever the limits of a municipality are enlarged in accordance with the provisions of this Part, it shall be the duty of the mayor of the municipality to cause an accurate map of such annexed territory, together with a copy of the ordinance duly certified, to be recorded in the office of the register of deeds of the county or counties in which such territory is situated and in the office of the Secretary of State. The documents required to be filed with the Secretary of State under this section shall be filed not later than 30 days following the effective date of the annexation ordinance. All documents shall have an identifying number affixed thereto and shall conform in size in accordance with rules prescribed by the Secretary. Failure to file within 30 days shall not affect the validity of the annexation. Any annexation shall be reported as part of the Boundary and Annexation Survey of the United States Bureau of the Census.

Cross References. --As to effective date of certain annexation ordinances adopted from January 1, 1987, to August 3, 1987, *see* § 160A-58.9.

CASE NOTES

Recordation of Map and Ordinance Not Condition Precedent to Annexation. --The requirement in this section that a map of the annexed territory, together with a certified copy of the ordinance, be recorded in the office of the register of deeds and in the office of the Secretary of State is not a condition precedent to the effective annexation of the territory, but is the imposition of a duty to be performed after

the annexation is complete. *Dale v. City of Morganton,* 270 N.C. 567, 155 S.E.2d 136 (1967).

160A-52. Authorized expenditures

Municipalities initiating annexations under the provisions of this Part are authorized to make expenditures for surveys required to describe the property under consideration or for any other purpose necessary to plan for the study and/or annexation of unincorporated territory adjacent to the municipality. In addition, following final passage of the annexation ordinance, the annexing municipality shall have authority to proceed with expenditures for construction of water and sewer lines and other capital facilities and for any other purpose calculated to bring services into the annexed area in a more effective and expeditious manner prior to the effective date of annexation.

§ 160A-53. Definitions

The following terms where used in this Part shall have the following meanings, except where the context clearly indicates a different meaning:

> (1) "Contiguous area" shall mean any area which, at the time annexation procedures are initiated, either abuts directly on the municipal boundary or is separated from the municipal boundary by a street or street right-of-way, a creek or river, the right-of-way of a railroad or other public service corporation, lands owned by the city or some other political

subdivision, or lands owned by the State of North Carolina.

(2) "Used for residential purposes" shall mean any lot or tract five acres or less in size on which is constructed a habitable dwelling unit.

CASE NOTES

Mobile Homes as "Constructed" for "Residential Purposes" Requirement. --Petitioners/property owners failed to overcome the presumption that the City substantially complied with § 160A-48(c)(3) when it moved to annex disputed areas; mobile homes used to meet the "urban purposes" percentage requirement were "constructed" on the lots pursuant to "residential purposes" as defined by subdivision (2) of this section, and the deletion of a condemned home, originally included as a "habitable" residence, did not affect the calculations or the city's compliance. *Bali Co. v. City of Kings Mt.,* 134 N.C. App. 277, 517 S.E.2d 208 (1999).

Tract Classified as Residential Despite Growing of Grass Thereon for Cattle Feed. --A city could classify a 1.83 acre tract with a rented house located on it as one lot used for residential purposes, despite the fact that on two separate parts of the lot fescue and sudex grass was grown and a person living in the neighborhood had been allowed to mow this grass, bale it and feed it to his cows. *Southern Glove Mfg. Co. v. City of Newton,* 75 N.C. App. 574, 331 S.E.2d 180, *cert. denied*, 314 N.C. 669, 336 S.E.2d 401 (1985).

Quoted in *Hawks v. Town of Valdese*, 299 N.C. 1, 261 S.E.2d 90 (1980).

Stated in *Livingston v. City of Charlotte*, 68 N.C. App. 265, 314 S.E.2d 303 (1984).

§ 160A-54. Population and land estimates

In determining population and degree of land subdivision for purposes of meeting the requirements of G.S. 160A-48, the municipality shall use methods calculated to provide reasonably accurate results. In determining whether the standards set forth in G.S. 160A-48 have been met on appeal to the superior court under G.S. 160A-50, the reviewing court shall accept the estimates of the municipality unless the actual population, total area, or degree of land subdivision falls below the standards in G.S. 160A-48:

> (1) As to population, if the estimate is based on the number of dwelling units in the area multiplied by the average family size in such area, or in the township or townships of which such area is a part, as determined by the last preceding federal decennial census; or if it is based on a new enumeration carried out under reasonable rules and regulations by the annexing municipality; provided, that the court shall not accept such estimates if the petitioners demonstrate that such estimates are in error in the amount of ten percent (10%) or more.

(2) As to total area if the estimate is based on an actual survey, or on county tax maps or records, or on aerial photographs, or on some other reasonably reliable map used for official purposes by a governmental agency, unless the petitioners on appeal demonstrate that such estimates are in error in the amount of five percent (5%) or more.

(3) As to degree of land subdivision, if the estimates are based on an actual survey, or on county tax maps or records, or on aerial photographs, or on some other reasonably reliable source, unless the petitioners on appeal show that such estimates are in error in the amount of five percent (5%) or more.

CASE NOTES

The Annexation Statutes Are Not Taxation Statutes, nor are they retrospective taxation statutes. *Little Red School House, Ltd. v. City of Greensboro,* 71 N.C. App. 332, 322 S.E.2d 195 (1984), *cert. denied and appeal dismissed*, 313 N.C. 514, 329 S.E.2d 392 (1985).

Tests as to Urban Development to Be Applied to Whole Annexation Area. --The tests to determine whether an area is developed for urban purposes must be applied to the annexation area as a whole. *In re Ordinance of Annexation No. 1977-4,* 296 N.C. 1, 249 S.E.2d 698 (1978).

Micro Approach Calculations Meet Urbanization Test. --Town met the urbanization test for annexation, where the town used a "micro approach" whereby it determined the number of dwelling units in each census block within the area to be annexed, then determined the average family size therein, then multiplied the number of dwelling units in each census block by the average family size to calculate the estimated population of each block, and finally added the block numbers together to produce the population estimate. *Williams v. Town of Kernersville*, 129 N.C. App. 734, 500 S.E.2d 770 (1998), *cert. denied*, 349 N.C. 241, 516 S.E.2d 611 (1998).

Census Figures Are More Reliable than Any Formula That Alters the Figures by Arbitrarily Assuming Vacancy Rates and adjusting for dwelling unit size. *In re City of Durham Annexation Ordinance No. 5791,* 66 N.C. App. 472, 311 S.E.2d 898 (1984).

This Section Contains No Requirement Regarding the Use of Final Census Data and there is no judicially imposed requirement. *In re City of Durham Annexation Ordinance No. 5791,* 66 N.C. App. 472, 311 S.E.2d 898 (1984).

Although this statute specifies the use of federal census data, it does not require the use of final rather than preliminary census data. *In re City of Durham Annexation Ordinance No. 5791,* 66 N.C. App. 472, 311 S.E.2d 898 (1984).

Applicability of Error Margins to Calculations under § 160A-48(C). --The five percent error margins allowed in subdivisions (2) and (3) of this section apply exclusively to calculations made by the municipality for purposes of establishing compliance with the population and subdivision tests contained within the alternative standards prescribed by § 160A-48(c). *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980).

The language of this section is free from ambiguity and represents a legislative determination that margins of error should be allowed with respect to the calculations made by a municipality to establish compliance with the population and subdivision tests of § 160A-48(c), but not with respect to the calculations made to establish compliance with the use test of § 160A-48(c). *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980).

Method of Calculating Number of Lots. --A municipality is not tied to any particular method of calculating the number of lots so long as the method utilized is calculated to provide reasonably accurate results. *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980).

The fact that different methods of lot calculation have been used by the city in past annexations is of no import where the record establishes that the method utilized in the annexation under scrutiny complies with the requirements of this section. *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980).

It is eminently reasonable for the city to follow actual use and ownership patterns instead of artificial patterns of subdivision in determining the number of lots in the area to be annexed. Such method of lot counting was calculated to provide reasonably accurate results as required by this section. *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980).

Applied in Thrash v. City of Asheville, 327 N.C. 251, 393 S.E.2d 842 (1990).

Quoted in *Asheville Indus., Inc. v. City of Asheville*, 112 N.C. App. 713, 436 S.E.2d 873 (1993).

Cited in *Shackelford v. City of Wilmington*, 127 N.C. App. 449, 490 S.E.2d 578 (1997), *aff'd*, 349 N.C. 222, 505 S.E.2d 80 (1998).

§ § 160A-55, 160A-56

Repealed by Session Laws 1983, c. 636.

Editor's Note. --Session Laws 1983, c. 636, which repealed these sections, in s. 37.1, as amended by Session Laws 1983, c. 768, s. 25, provided: "The General Assembly intends by this act to repeal all acts and provisions of acts that modify the application to particular cities and towns of Parts 2 and 3 of Article 4A of Chapter 160A of the General Statutes or that exempt particular cities or towns from the application of either or both of those two Parts. Therefore, all such acts and provisions of acts, even if not specifically listed and repealed in Sections 26 through 35.4 of this act, are repealed.

Neither this section nor Sections 26 through 35.4 of this act shall affect any annexation in progress on the dates of ratification of this act under any of the repealed or amended sections."

Section 38 of Session Laws 1983, c. 636 provided: "This act shall be effective with respect to all annexations where resolutions of intent are adopted on or after the date of ratification of this act, except that Sections 36 and 37 shall become effective with respect to all annexations where resolutions of intent are adopted on or after July 1, 1984, Sections 25.1 through 35.5 and Section 37.1 are effective upon ratification and Section 25 shall become effective as provided in that section. No annexation where a resolution of intent was adopted prior to the date of ratification of this act shall be affected by this act except as provided in Section 25."

Session Laws 1983, c. 636 was ratified June 29, 1983.

§ 160A-57: Reversed for future codification purposes.

§ 160A-58. Definitions

The words and phrases defined in this section have the meanings indicated when used in this Part unless the context clearly requires another meaning:

(1) "City" means any city, town, or village without regard to population, except cities not qualified to receive gasoline tax allocations under G.S. 136-41.2.

(2) "Primary corporate limits" means the corporate limits of a city as defined in its charter, enlarged or diminished by subsequent annexations or exclusions of contiguous territory pursuant to Parts 1, 2, and 3 of this Article or local acts of the General Assembly.

(3) "Satellite corporate limits" means the corporate limits of a noncontiguous area annexed pursuant to this Part or a local act authorizing or effecting noncontiguous annexations.

Local Modification. --(As to Part 4) Iredell and municipalities located therein: 1989, c. 598, s. 12.1; (as to Part 4) town of Dobbins Heights: 1983, c. 658; town of Moorehead City and Newport: 1997-219, s. 1; 1997-363, s. 1.1.

Cross References. --As to effective date of annexation ordinances adopted under Article 4A of Chapter 160A, *see* § 160A-58.9A.

Legal Periodicals. --For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," *see* 63 N.C.L. Rev. 1260 (1985).

CASE NOTES

Satellite Corporate Limits Are Not "Municipal Boundaries" as that term is used in § 160A-36. *Hawks v. Town of Valdese,* 299 N.C. 1, 261 S.E.2d 90 (1980).

Satellite Corporate Limits. --A corporate limit is defined as a satellite only when there is no connection whatsoever between the municipality and the satellite. *Williams v. Town of Kernersville*, 129 N.C. App. 734, 500 S.E.2d 770 (1998), *cert. denied*, 349 N.C. 241, 516 S.E.2d 611 (1998).

Cited in *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E.2d 576 (1976); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980).

APPENDIX D

THE GENERAL ASSEMBLY OF NORTH CAROLINA

H.B. 63
CHAPTER 363

AN ACT TO RESTORE EXTRATERRITORIAL PLANNING POWERS OF THE TOWN OF RIVER BEND BUT PROHIBIT IT FROM MAKING INVOLUNTARY ANNEXATIONS AND CONCERNING ANNEXATION OF AREAS BY THE TOWNS OF MOREHEAD CITY AND NEWPORT WHERE PLANNING JURISDICTION WAS RECENTLY GRANTED TO THOSE TOWNS BY LOCAL ACT.

The General Assembly of North Carolina enacts:

Section 1. Section VI of the Charter of the Town of River Bend, being that Charter approved by the Municipal Board of Control and filed with the Secretary of State on January 14, 1981, as added by Chapter 26 of the Session Laws of 1987, reads as rewritten:

"Section VI. ~~The Town may not exercise any extraterritorial jurisdiction or extraterritorial powers under Article 19 of Chapter 160A of the General Statutes.~~ (a) The city must hold a referendum on whether to annex an area into the city of the city council receives a petition opposing the annexation signed by twenty-five percent (25%) of the registered voters who own real property in the area proposed

to be annexed. The petition must be received by the city council no later than the adjournment of the public hearing required to be held under G.S. 160A-37. If the city council receives such a petition, then the annexation ordinance shall become effective only if approved by the voters of the area proposed to be annexed.

(b) If a referendum is required under subsection (a) of this section, the city council shall order the board of elections which conducts elections for that city to call an election to determine whether or not the proposed territory shall be annexed to the city or town. Within 90 days after receiving such order from the governing body, the county board of elections shall proceed to hold an election on the question.

Such election shall be called by a resolution or resolutions of said county board of elections which shall:

(1) Describe the territory proposed to be annexed to the said city or town as set out in the order of the said local governing body;

(2) Provide that the matter of annexation of such territory shall be submitted to the vote of the qualified voters of the territory proposed to be annexed; and

(3) Provide for registration of voters in the territory proposed to be annexed for said election in accordance with G.S. 163-288.2.

Said resolution shall be published in one or more newspapers of the said county once a week for 30 days prior to the closing of the registration books. All costs of holding such election shall be paid by the city or town. Except as herein provided, the election shall be held under the same statutes, rules, and regulations as are applicable to elections in the municipality whose corporate limits are being enlarged.

At such election the question on the ballot shall be:

'[ ] FOR [ ] AGAINST
Annexation'

If at the election a majority of the votes cast from the area proposed for annexation shall be 'For Annexation', the annexation ordinance shall become effective as provided by this Part.....

....(c) The Town of River Bend has jurisdiction under Article 19 of Chapter 160A of the General Statutes over the following described territory:

TRACT ONE

Lying and being situated in Number Eight township, Craven County, North Carolina and described as follows:

BEGINNING at a point on the southern right-of-way line of U.S. Highway 17, said point being the northwest corner of plan of Piner Estates recorded in Plat Cabinet D, Slide 666, Craven County Registry; thence from said point of beginning along and with westernmost line of said Piner Estates S27

degrees 29' 38"W 528.53 feet to the north westernmost corner of lot No. 1, Craven Woods Subdivision recorded in Plat Cabinet C, Slide 41. Craven County Registry; thence along and with line between aforesaid Piner Estates and Craven Woods Subdivisions N53 degrees 05' 15"E 1186.76' to a point; thence continuing with said line N69 degrees 00' E 1106.85 feet to a point, the south easternmost corner of Lot 1. Piner Estates; thence, S29 degrees 34' 19"E to the centerline of secondary road No. 1307, (this point being designated by the letter 'C' on that certain map or plat entitled Trent Estates recorded in Map Book 10, Page 72. Craven County Registry); thence continuing S29 degrees 34' 19"E 30.0 feet to a point on the southern right-of-way line of secondary road No. 1307; thence with said southern right-of-way line of secondary road No. 1307 in a westwardly direction to a point on said southern right-of-way line where 'Harris' easternmost line extended southwardly would intersect said right-of-way line; thence, N00 degrees 12' 17"W 199.96 feet to a point; thence with said Harris easternmost line N84 degrees 45' 48"W 95.12 feet to a point; thence N3 degrees 11' 55"E 147.81' to a point on the southern right-of-way line of U.S. Highway No. 17; thence, with said southern right-of-way line of U.S. Highway No. 17. S67 degrees 00'W 493 feet to a point at the intersection of said southern right-of-way line of U.S. Highway 17 and Canoe Branch; thence in a northerly direction with said Canoe Branch to its intersection with the centerline of Seaboard Coastline Railway, now abandoned; thence with said centerline of Seaboard Coastline Railway in an easterly direction to a point where the western line of Hidden Oaks Subdivision, recorded in Plat Cabinet D. Slide 455, Craven County Registry, extended would intersect said centerline;

thence S25 degrees 51' 58"E 62.5 feet to the northwestern corner of said Hidden Oaks Subdivision; thence with said northernmost line of Hidden Oaks Subdivision N69 degrees 43' 03"E 3. 111.74 feet to the northeast corner of said Hidden Oaks Subdivision S22 degrees 23' E 731.08 feet to a point on the northern right-of-way line of U.S. Highway No. 17; thence continuing S22 degrees 23'E 150.0 feet to a point on the southern right-of-way line of U.S. Highway No. 17; thence with said southern right-of-way line of U.S. Highway No. 17, S67 degrees 48' 50" W 727.98 feet to the northeastern corner of aforesaid Piner Estates; thence continuing with said southern right-of-way line S67 degrees 48' 50" W 2,271.20 feet to the Point of Beginning.

TRACT TWO

Lying and being situated in Number Eight Township. Craven County, North Carolina and described as follows:

BEGINNING at the southernmost corner of Lot No. 18 Plan of Springdale Subdivision recorded in Plat Cabinet D, Slide 623. Craven County Registry; said corner being on the northern right-of-way line of U.S. Highway No. 17 thence along and with the easternmost line of aforesaid Springdale Subdivision N22 degrees 22' 03" W 277.0 feet to a point; thence S62 degrees 05'E to the northwestern corner of Lot 79, Plan of Deerfield Subdivision, Phase 3, recorded in Plat Cabinet E, Slide 333, Craven County Registry; thence with northernmost line of aforesaid Deerfield Subdivision. Phase 3, N66 degrees 50' 56"E 473.81 feet to a point; thence N50 degrees 07' 40"E 281.86 feet to a point on the western right-of-way line of Forest Oaks Drive; thence with western right-

of-way line of Forest Oaks Drive; thence with western right-of-way line of Forest Oaks Drive S42 degrees 22' 20"E 200.19 feet to the northern right-of-way line of Rocky Run Road; thence with said right-of-way of Rocky Run Road S03 degrees 28' 20"E 97.78 feet to a point on the northern right-of-way line of U.S. Highway No. 17; thence S66 degrees 50' 56"W along and with said northern right-of-way line of U.S. Highway No. 17 to the Point of Beginning."

Section 1.1 Section 1 of S.L. 1997-219 reads as rewritten:

"Section 1. The Towns of Morehead City and Newport may not annex noncontiguous areas as provided in Part 4 of Article 4a of Chapter 160A of the General Statutes if the area to be annexed is closer to the other Town's corporate limits than it is to the corporate limits of the Town desiring to annex the area. However, either Town may annex such an area if it lies within an area where the Town could exercise its extraterritorial planning jurisdiction under S.L. 1997-185, or where the Town is exercising its extraterritorial planning jurisdiction under Article 19 of Chapter 160A of the General Statutes."

Section 2. This act becomes effective 30 days after it becomes law.

In the General Assembly read three times and ratified this the 6th day of August, 1997.

Became law on the date it was ratified.

THE GENERAL ASSEMBLY OF NORTH CAROLINA

H.B. 739
CHAPTER 638

AN ACT TO REQUIRE THAT ANY EXTENSION OF THE CORPORATE LIMITS OF THE TOWN OF HOLDEN BEACH BE SUBJECT TO A REFERENDUM.

The General Assembly of North Carolina enacts:

Section 1. In addition to the requirements of Article 4a of Chapter 160A of the General Statutes, any extension of the corporate limits of the Town of Holden Beach shall be subject to approval by the qualified voters of the Town as set forth in this act.

Section 2. Any annexation by the Town of Holden Beach shall, in addition to the requirements of Article 4a of Chapter 160A of the General Statutes, be effective only if approved by the qualified voters of the Town in a referendum if:

(1) A referendum on the proposed annexation is called by the Board of Commissioners of the Town in the annexation ordinance; or

(2) A petition calling for a referendum and containing the signatures of not less than forty percent (40%) of the registered voters of the Town is filed with the Board of Commissioners of the Town no later than 20 days after adoption of the annexation ordinance.

Section 3. The Holden Beach Board of Commissioners shall establish procedures to implement this act governing verification of petitions and signatures, timing of elections, and effective dates of annexation ordinances in the event of an election.

Section 4. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 11th day of July, 1991.

APPENDIX E

NORTH CAROLINA COURT OF APPEALS

NO. COA99-674

[Filed April 18, 2000]

HERCHEL E. ROGERS	)
and wife, JULIA P.	)
ROGERS, et al.	)
Petitioners-Appellants,	)
v.	)
	)
CITY OF WILMINGTON	)
Respondent-Appellee.	)
	)

New Hanover County
No. 98 CVS 2388

Appeal by petitioners from order and judgment entered 16 December 1998 by Judge William C. Griffin in Superior Court, New Hanover County. Heard in the Court of Appeals 14 March 2000.

Shipman & Associates, L.L.P., by Gary K. Shipman and C. Wes Hodges, II, for petitioners-appellants.

Thomas C. Pollard, City Attorney, for the City of Wilmington.

WYNN, Judge.

In 1994, the City of Wilmington began a three part involuntary annexation of a 27 square mile area of unincorporated land. Our Supreme Court in an evenly split decision upheld Phase I of the annexation which incorporated 10 square miles and 10,000 residents. *Shackelford v. City of Wilmimgton,* 349 N.C. 222, 505 S.E.2d 80 (1998).

However, the residents in the area to be annexed by Phase II successfully challenged that annexation on the grounds that Wilmington violated N.C. Gen. Stat. § 160A-48(e) (1994) by not fixing the southern boundary of the proposed annexation area along topographic features or streets. On that ground, the Superior Court of New Hanover County declared the annexation ordinance null and void. *Rogers v. City of Wilmington, New Hanover* County, 97 CVS 3449.

Wilmington responded to the trial court's nullification of the Phase II annexation ordinance by redrawing the boundary lines to include Wilmington's city limits to the west, Bradley Creek to the North, Whiskey Creek to the south, and the western right-of-way of the Atlantic Intracoastal Waterway to the east.

The subject of this appeal, the Atlantic Intracoastal Waterway, is a man-made channel dredged through coastal sounds and marine marshes. It approximately parallels the coast of the Atlantic Ocean between Norfolk, Virginia and the St. John's River in Florida. Near Wilmington, the Atlantic Intracoastal Waterway runs through Masonboro Sound, a natural body of water. The Army Corps of Engineers

dredged the Atlantic Intracoastal Waterway between 1927 and 1940 within a 1,000 feet wide right-of-way. The channel itself is only 90 feet wide; the remainder of the right-of-way is used for maintenance of the channel.

The petitioners against this annexation own real property located in the area to be annexed. They generally challenged Wilmington's compliance with North Carolina's annexation statutes, but before trial, the petitioners abandoned all claims except the question of whether Wilmington complied with N.C. Gen. Star. § 160A-48(e) (1994) in fixing the boundaries of the annexation area. They contended in the trial court that the Atlantic Intracoastal Waterway is a man-made feature and not a natural topographic feature or street as required by the statute.

Indeed, the trial court considered evidence about the dredging of the Atlantic Intracoastal Waterway, the type of terrain it runs through, and whether in is a natural feature of the land. Several expert witnesses testified for both sides. The trial court found that (1) Masonboro Sound is a natural topographic feature; (2) the proposed eastern boundary of the annexation area follows and is located in Masonboro Sound; (3) there are continuous lagoons and bodies of water along the eastern boundary of the proposed annexation area; (4) the area of Masonboro Sound is subject to change, and whiskey Creek and Bradley Creek are also subject to change; (5) the mean high tides of Masonboro Sound, Whiskey Creek and Bradley Creek are constantly modified by natural and man-made forces; (6) the Atlantic Intracoastal Waterway is a man-made feature which coincides with and overlaps a natural topographic feature; (7) the Atlantic Intracoastal Waterway has become part of the natural system of the area; (8) the

western right-of-way of the Atlantic Intracoastal Waterway generally follows and coincides with the easternmost edge of the low water line of Masonboro Sound; (9) soil maps show a change in soil type along the western right-of-way of the Atlantic Intracoastal Waterway; (10) as practically as possible, Wilmington located the eastern boundary line of the proposed annexation area on a natural topographic feature.

The trial court also found that Wilmington could have used other natural topographic features in drawing its eastern boundary--namely, the high water line of Masonboro Sound--but was not required to do so since it followed another topographic feature; the petitioners were not materially injured by Wilmington's proposed eastern boundary; and the petitioners did not plead in their petition for review the doctrine of offensive collateral estoppel.

The trial court concluded that N.C. Gen. Star. § 160A-48(e) does not prohibit Wilmington from using a surveyed line which generally follows and coincides with natural topographic features and is located within a natural topographic feature to describe the boundary for an annexation area. Wilmington therefore complied with N.C. Gen. Stat. § 160A-48 in fixing its eastern boundary. The trial court also concluded that the doctrine of offensive collateral estoppel should not be applied in this case The petitioners appealed to this Court.

I.

The petitioners first argue that the trial court erred in affirming the annexation ordinance because Wilmington failed to use natural topographic features or streets, wherever

practical, in fixing the eastern boundary of the annexation area as required by N.C. Gen. Stat. § 160A-48(e) (1994)[5] That statute provided:

> In fixing new municipal boundaries, a municipal governing board shall, wherever practical, use natural topographic features such as ridge lines and streams and creeks as boundaries, and may use streets as boundaries. Some or all of the boundaries of a county water and sewer district may also be used when the entire district not already within the corporate limits of a municipality is being annexed.

On appeal, the trial court's findings of fact supported by competent evidence, bind this Court. *See Food Town Stores, Inc. v. City of Salisbury,* 300 N.C. 21, 25-26, 265 S.E.2d 123, 126 (1980) . We must uphold the findings of fact even if there is evidence to the contrary, but we review the trial court's conclusions of law *de novo. See id.*

The record on appeal shows testimony that supports the trial court's finding of fact that the Atlantic Intracoastal Waterway is a topographic feature. That evidence shows that it follows and is located in Masonboro Sound and it has become a part of the surrounding natural system. The western edge of the Atlantic Intracoastal Waterway follows the low tide mark of Masonboro Sound, and the soil

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[5] The General Assembly recently amended N.C. Gen. Stat. § 160A-48 (e) effective 1 November 1998. It now requires a municipality to use property lines and streets as boundaries.

differences on either side of the line add further evidence to the conclusion that it follows a natural topographic feature. Although the Channel was dredged by man, it was surveyed along an already existing natural topographic feature. All of these aspects of the Atlantic Intracoastal Waterway support the trial court's finding that it is a topographic feature in its own right. We therefore uphold the trial court's conclusion that the Atlantic Intracoastal Waterway constitutes a proper annexation boundary under N.C. Gen. Stat. § 160A-48(e) .

II.

The petitioners next argue that the trial court erred by refusing to apply the doctrine of offensive collateral estoppel because the precise legal issue in this annexation challenge was litigated, determined, and necessary to a former judgment. We disagree.

The doctrine of collateral estoppel precludes relitigation of an issue decided previously in a judicial or administrative hearing, so long as the party against whom the prior decision is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding. *See King v. Grindstaff,* 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973). Collateral estoppel may bar relitigation of an issue even if it arises under a new cause of action. *See Tar Landing Villas Owners' Ass'n v. Town of Atlantic Beach*, 64 N.C. App. 239, 242, 307 S.E.2d 181, 184 (1983), *review denied,* 310 N.C. 156, 311 S.E.2d 296 (1984). The doctrine may be asserted offensively or defensively, *see Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329, 58 L. Ed. 2d 552, 561 (1979). Offensive use of the collateral estoppel occurs when a plaintiff

seeks to prevent a defendant from relitigating issues Zhe defendant previously and unsuccessfully litigated. *See id.*

In the case at bar, the petitioners contend that the doctrine of collateral estoppel precludes Wilmington from relitigating issues decided by the trial court in the initial nullification of the phase II annexation ordinance. They argue that Wilmington is now precluded from relitigating the standard for non-compliance with N.C. Gen. Stat. 160A-48(e).

In the original Phase II annexation ordinance, Wilmington attempted to use property lines in fixing the southern boundary of the proposed annexation area. The trial court found that the southern boundary did not comply with N.C. Gen. stat. § 160A-48(e) because it did not follow topographic features. But the trial court did not decide whether the use of the Atlantic Intracoastal Waterway as a boundary line violated the statute. In than challenge, while the eastern boundary of the original Phase II annexation ordinance included part of the Atlantic Intracoastal Waterway, the petitioners only challenged the use of property lines along the proposed southern boundary. Indeed, in that challenge, the petitioners did not challenge the use of the Atlantic Intracoastal Waterway as a topographic feature. Thus, the issue in this case was not litigated in the challenge to the original Phase II annexation.[6]

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[6] In the first proposed Phase II annexation, Wilmington's proposed eastern boundary included part of the Atlantic Intracoastal Waterway, although not as much as in the case at bar. In the litigation over the first Phase II, the petitioners only challenged the use of property lines along the proposed southern boundary. They

Affirmed.

Judges MARTIN and HUNTER concur.

Report per Rule 30(e).

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did not challenge the use of the Atlantic Intracoastal Waterway as a topographic feature. If anything, it is the *petitioners* who should be precluded from relitigating the issue of whether the Atlantic Intracostal Waterway boundary complies with N.C. Gen. Stat. § 160A-48(e), since they previously accepted it as a legitimate boundary.

SUPREME COURT OF NORTH CAROLINA
(Rogers v. City of Wilmington)

No. 264P00

[Filed August 24, 2000]

From NC Court of Appeals
(COA99-674)
From New Hanover
(98CVS2388)

HERCHEL E. ROGERS and wife, JULIA P. ROGERS, et al.	)
	)
v.	)
	)
CITY OF WILMINGTON	)

ORDER

Upon consideration of the petition filed by Petitioners in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 24th day of August 2000.

/s/ Freeman, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of August 2000.

Christie Speir Cameron
Clerk, Supreme Court
of North Carolina
/s/ _____
Carol B. Templeton
Assistant Clerk